EUROPEAN UNIVERSITY INSTITUTE

DEPARTMENT OF LAW

PERSPECTIVES ON LAW: SYSTEM, AUTHORITY AND LEGITIMACY IN THE EUROPEAN UNION

CATHERINE RICHMOND

THESIS SUBMITTED WITH A VIEW TO OBTAINING THE DOCTOR OF LAWS OF THE EUROPEAN UNIVERSITY INSTITUTE

Florence, Italy, May 2000

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To my parents, Peter and Dorothy

Contents

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particularly Kitty, Mireia, Pedro, Leo and (as an honorary member) Joss, who were always ready for a *caffè* or a *gelato* and a chat.

List of Abbreviations

All ER	All England Law Reports.
CL	Hart, H.L.A., *The Concept of Law*, Clarendon Press, Oxford, 2nd edition (eds. Joseph Raz and Penelope A. Bulloch), 1994.
CMLR	Common Market Law Reports.
EC	European Community.
ECJ	European Court of Justice.
EC Treaty	European Community Treaty.
ECR	European Court Reports.
EU	European Union.
FL	Dworkin, Ronald, *Freedom's Law: The Moral Reading of the American Constitution*, Harvard University Press, Cambridge, 1996.
GTLS	Kelsen, Hans, *General Theory of Law and State*, Russell and Russell, New York, 1961.
IPLT	Kelsen, Hans, *Introduction to the Problems of Legal Theory*, trans. B. and S. Paulson (translation of the first edition of *Reine Rechtslehre*, 1934), Clarendon Press, Oxford, 1992.
LE	Dworkin, Ronald, *Law's Empire*, Fontana, London, 1986.

PIL	Kelsen, Hans, *Principles of International Law*, 2nd Ed., revised and edited by Robert W. Tucker, Holt, Rinehart and Winston, New York, 1966.
PTL	Kelsen, Hans, *The Pure Theory of Law*, trans. Knight (second edition of *Reine Rechtslehre*, 1960), University of California Press, Berkeley, 1967.
TA	Treaty of Amsterdam.
TEU	Treaty on European Union (Treaty of Maastricht).
TRS	Dworkin, Ronald, *Taking Rights Seriously*, Duckworth, London, 1977.

Introduction

> "Take an old man's word: there's nothing worse than a muddle in all the world. It is easy to face Death and Fate, and the things that sound so dreadful. It is on my muddles that I look back with horror – on the things that I might have avoided...I used to think I could teach young people the whole of life, but I know better now, and all my teaching of George has come down to this: beware of muddle."
>
> E. M. Forster, *A Room with a View*.

I had read *A Room with a View* before coming to Florence to begin life as a postgraduate student at the European University Institute, and Forster's warning against muddle came back to me as soon as I started to look at the legal literature on the European Union. Words such as sovereignty, legitimacy and competence were thrown into the melting pot with little consideration of their meaning and significance.

When I turned to legal philosophers who might be able to sort out this muddle, it was Kelsen, oddly enough, who offered the right tools. Kelsen's concern is to expose those who, behind the trappings of fine and emotive words such as 'sovereignty', sought to conceal their own jingoism and prejudice. This concern

seems to sit uneasily with Kelsen's pursuit of legal philosophy and his development of a theory which, he claims, is 'pure' – free from ideology and free from politics. Yet the pure theory is not an escape from the knotty problems of power, authority, and legitimacy but a response to them. It is a response which has its roots in a drive for clarity, honesty, and truth in relation to our muddled societies.

This thesis therefore flows primarily from the work on Kelsen contained in Chapters Two and Three. It was Kelsen's emphasis on the necessity, as a scientist, of identifying as clearly as possible not only the subject matter of one's study but also the boundaries of the viewpoint from which that subject will be studied, which led me to develop the work on perspectives which ultimately shapes the thesis.

The thesis is pulled simultaneously in two directions. It is divided into four Parts which are based on, firstly, the organising theme, perspectives, and secondly, the three substantive topics: the system, authority, and legitimacy of the European Union. The chapters are organised according to different perspectives, although this structure is a means of transport only: the destination is the three concepts of system, authority and legitimacy. Our awareness of perspective is only of value insofar as it aids our understanding of those topics.

I first turn to Kelsen in an attempt to understand the nature of the legal system of the European Union and the authority which it has over the Member States and their citizens. Each country of the European Union enjoys a stability and strength that can only arise from a long-held custom of acceptance of the value of national political and legal systems. We are in the habit of obeying the laws our governments make, and of respecting the decisions taken by our judges. Our political and legal authorities have the legitimacy of long-established structures with which we identify ourselves and our sense of community. Our societies are like mature trees: we may look to prune here and there, but little more.

The European Union, on the other hand, is historically a mere sapling. Yet the fundamental difference between our relationship with our own nation and our relationship with the Union lies not solely in the newness within Europe of the latter's legal and political order, but in the fact that the sapling of the Union is consistently ripped up and its roots subjected to frosty scrutiny.

This thesis is, in fact, a root-ripping exercise: on the premise that we must dig deep in order to confirm the solidity of the foundations on which we wish to build, it examines the deepest roots of the construction that has become the European Union. The first step, which must logically precede the questions of authority and legitimacy, is to ask whether the law of the Union may be viewed as an independent order.

This question is tackled, using Kelsen's theory of law, in Chapter Two. However, I must flag the process of elimination which led to this choice. As a lawyer educated within the English and Welsh legal system, I first turned to the legal theory which takes centre place in many courses of legal philosophy in those countries: that of H.L.A. Hart. Hart's theory is considered briefly in Chapters One, Two and Three, not only in relation to the perspective of study that he advocates, but in relation to his concept of a legal system. Hart's 'rule of recognition' boils down to a social fact, the fact of the habitual practice by a significant number of members of a political system in recognising that law may be identified by reference to certain criteria. In Chapter One I argue that the existence of obligation cannot depend on the existence of social practice. The inadequacy of the reliance on established social practice is put starkly into relief when applied to the brand new legal order constituted within the European Union.

I therefore go to Kelsen, who identifies the difference between recognising a rule as a social practice and recognising a rule as a norm which demands to be obeyed. Kelsen rejects the empirical approach of Hart, whose rule of recognition is a sociological construct the existence of which is empirically

verifiable against actual behaviour, in favour of a constructivist approach which is to be tested only in relation to its capacity to aid our understanding of law.

This constructivist approach is the manifestation of Kelsen's insistence on the scientific, 'pure' study of law. In Chapter One I distinguish three points of view which form the backbone of the rest of the thesis. Firstly, there is the external point of view, the perspective of the outsider, whether anthropologist, sociologist, or alien. This is the subject who is concerned to describe the behaviour and practices of those studied. Secondly and thirdly there are the two points of view which constitute an 'internal' attitude towards the object of study. One, the 'detached normative perspective', is the scientific point of view of Kelsen's anarchic legal professor, the person who has no interest in promoting or applying the laws of the system, but who is able to understand law from the perspective of those who do. The other, the 'committed normative perspective', is the point of view of those, such as judges and most citizens, who use and are committed to the law and believe that it should be obeyed.

The work on perspective is continued in Chapter Four, where I look more critically at their use. There are various pitfalls, not least the tendency to mistakenly believe that one's own perspective is total and one's understanding more 'correct' and whole than another's. In addition, understanding may change according to the purpose with which a point of view is adopted, and by the features and experience of the self. Lastly, understanding has effects on the person who seeks to understand: he may too easily change to adapt to the object of study, or the object of study may reinforce his existing prejudices.

Kelsen is well aware of the partial nature of particular perspectives, and it is his detached normative point of view that I adopt in order to consider the legal system of the Union (which, as I explain in Chapter Two, I term for convenience 'the European Community'). Although the idea of a system is in some ways technical, it is also at the root of the decidedly non-technical concepts of authority and legitimacy. The Court of Justice claims that the

Community is an independent legal order. Using the detached normative perspective this is not necessarily the case, but Kelsen's legal theory gives us the tools to understand possible bases for this claim. First of all, the formal structure of the Community legal order shows a degree of centralisation which places the Community between a confederation (a body of international law) and a federation (a body of state law). On this test the Community is truly sui generis.

However, Kelsen's concept of a norm gives us a second, far more effective way of tackling the Community. Norms are linked by a chain of validity; each norm is validated by another norm, which in turn can be traced to another norm; this chain forms a unity or system if each norm can be ultimately traced back to the Grundnorm. This chain of validity is clearly present within the Union, and also allows us to move beyond formal structures and labels such as 'Community' and 'Union'. A norm is a member of a legal system simply if its validity is ascribed and delimited by another norm.

There are three possible Grundnorms which ultimately validate the EC legal order: a norm of international law, a norm of Member State law, or an norm which is independent and validates the EC system alone. I argue that the strongest case can be put for the hypothesis that the European Community was validated by a norm of international law, but that a 'revolution' has taken place and that an independent Grundnorm is now presupposed in relation to it. However, the nature of the detached normative perspective is that the Grundnorm cannot be verified. The Grundnorm is presupposed; it is a fiction. It shows us that it is possible to conceptualise an independent Community system, but the detached normative view is silent on which hypothesis regarding the legal authority of Union law is 'correct'.

This silence becomes even more notable once I move on to the vexed question of sovereignty and the relationship between the international, Member State and Community legal systems. In the last paragraph, I used the phrase 'legal authority of Union law'. By this term 'legal authority' I mean the Kelsenian

theory introduced above: that authority can be tested and measured simply by norms' validation by other norms. The emotive implications of the concept of authority become clearer when we consider that the quick answer to the question why we understand our law to be authoritative in the context of our nation states is sovereignty: the law has authority because it is created by a sovereign body such as a parliament.

In Chapter Three I apply Kelsen's theory once again, this time to the authority of the Union. I take the chain of validity to its logical conclusion and, applying this monist theory, set out nine different models of the normative relation between the Member State, international and Community legal orders. There is only ever one Grundnorm, presupposed in relation to one of the systems, but which ultimately validates all three. Again, however, Kelsen enables us to see the alternatives at the root of any claim to sovereignty, but is silent as to the legitimacy of the selection of one particular alternative.

So legal validity and the idea that authority can be established legally (and, by implication, neutrally) take us only part of the way toward understanding legitimacy as justified authority. The application of Kelsen's theory helps us clarify the question; but, as MacCormick comments, "at the interface of law and politics, Kelsen's austerity is unproductive".[1] So, then, I move on in Chapter Four to take a closer look at the interface of law and politics to which Kelsen has brought us, and to consider more carefully in what way the law of the European Union can be said, from any perspective, to be legitimate.

The first problem to overcome in this context is that 'authority' and 'legitimacy' as terms are bandied about with little analysis of what either might mean. Authority, I argue, is the right to rule: it is distinguishable from brute force or the power to command by its claim to have the right to issue obligating commands. I distinguish various kinds of authority which may constitute a

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[1] MacCormick, *Questioning Sovereignty*, p.23.

judgment of 'legitimacy', including social, legal and normative justifications of authority. Social legitimacy, for example, is the legitimacy conferred upon a regime by power: a political system may be said to be legitimate if it is supported by enough people to be effective in its enforcement of rules. It is the third concept of legitimacy, however, which I choose to focus upon in relation to the legitimacy of the Union. Normative legitimacy is the idea that authority may be justified if it is exercised in accordance with particular values or principles.

In order to examine this idea, I use Ronald Dworkin's theory of law as integrity, for Dworkin's work is based upon the claim that only a community which accepts the political principle of integrity can claim genuine authority and legitimacy. Dworkin's work is therefore founded upon the idea that authority, to be justified (and thus legitimate), must meet certain criteria. Dworkin views political authority as deriving from a particular form of community which can support its members' use of authoritative standards for the maintenance of its communal life.

Applying Dworkin's theory to the European Union it is clear that on Dworkin's test the authority of the Union cannot be described as justified. Dworkin demands a level of coherence and cohesion that are not fulfilled within Europe, particularly since the extension by the Treaty of Amsterdam of the concept of 'flexibility', which is in direct conflict with Dworkin's emphasis upon integrity within a legal order. The Union does not give integrity and coherence the overwhelming importance that Dworkin ascribes to them; it does not wish to impose unity where to do so would be to ride rough-shod over difference.

This conclusion, however, leads me to look more closely at normative legitimacy. Clearly, once we leave behind Kelsen's 'neutral' and detached legal science we enter the messier realms of values, moral and political, which do not lend themselves to neat models of validity. Many of the criticisms of Dworkin

are based upon the argument that he takes the perspective of the Herculean judge and claims that what is essentially a theory of legal reasoning is a theory of law. Criticism of Dworkin on the basis that he claims too much for Judge Hercules does not, however, diminish the force of his theory of legal reasoning. Given the complexity of the purposes which may conceivably be contained within the committed normative perspective from which a consideration of normatively justified authority must begin, one solution is to work from the point of view of a clearly identified subject. In Chapter Five it is the perspective of the European Union judge which is adopted.

Chapter Five looks at the question of the legitimacy of decisions made by judges within the Union, focusing particularly on the judges of the European Court of Justice. Having rejected, in Chapter Four, Dworkin's claim to offer a theory of law, I use his concept of law as integrity as a theory of adjudication, a program of decision-making which looks to both judge and law in its concern for legitimacy. The question of the legitimacy of a decision of a court is based on the question of what the law is, and there has been argument over the years that the European Court of Justice has made decisions which are 'wrong in law' and therefore illegitimate. I argue that, just as in questions of sovereignty, questions of the correctness and legitimacy of decisions of European judges can only be tested by honesty and clarity in the choices which are made in establishing the criteria according to which a decision is judged to be correct. Some critics of the Court of Justice believe that certain of the ECJ's decisions are 'wrong' because they do not correspond with their criteria of correct decision-making – but they fail to elaborate or justify their criteria. Any judgment of correctness needs a normative yardstick, criteria against which one may decide that a judgment is correct.

The Court of Justice has developed the 'teleological' approach to decision-making, which emphasises the principles and purposes underlying the law. Dworkin's 'program of adjudication', I argue, gives a sophisticated account of legal reasoning according to which the approach of the Court of Justice cannot

be judged to be 'activist' or 'illegitimate'. However, Dworkin's work gives too much weight to integrity, requiring the judge to look for a rational and coherent whole. Referring back to the criticisms of Dworkin's approach to authority discussed in Chapter Four, I argue that while Dworkin gives useful guidance in the process of rational decision-making, ultimately there is a variety of incompatible right answers and that the morally soundest solution is preferable to the most coherent.

In the Union integrity may take second place to establishing co-ordination, especially where integrity would require silencing many different voices in order to achieve the one voice with which Dworkin's personified community speaks. The certainty of rules becomes more precious than the flexibility of principles where authority is fragmented and rules are based on political compromise and co-operation rather than a background scheme of principle.

Thus from the legitimacy of the decisions of the European Court of Justice I move on in Chapter Six to consider the legitimacy of the European Union. I argue that no political organisation is legitimate in itself; it can only be justified through its capacity to fulfil the tasks which are the reason for which people choose to act together rather than alone. A community exists to enhance the opportunity for every one of its members to have the best life possible: the authority of the Member States and the Union is only legitimate to the extent that it furthers the common good. And this argument brings the thesis full circle to the 'central case' discussed in the first chapter, the central case of the practically reasonable perspective, from which we can attempt to establish the conditions under which people can flourish.

It is from this point of view that I consider the ideals of community and of participation which may further these conditions within the Union. Again, Dworkin is used as a springboard, this time for a discussion of the ways in which a political community may come together in a way which justifies the authority it exercises over its members. I look at the minimum conditions for a European

demos, the inter-relation between multiple political communities, types of democracy and the nature and definition of collective action.

However, although all these ideals must be considered with an eye on the opinion of those who, looking at the roots of the authority of the Union, find nothing more than myth. I find that the constitutional mythology of the United States has begun to be mirrored within Europe too, and I consider Schlag's view that the idea of legitimacy and our attempts to justify authority are no more than empty circles.

Yet even Schlag concedes that any sort of communal life at all may necessarily be a construction based on myth. As I try to show right from the start of the thesis, understanding is a constructive activity: our choices in understanding are the foundations and building blocks of what we then call 'reality'. While we may sometimes wish to listen to the sceptic arguing that the promise to deliver an examination between ideal and reality is never fulfilled, and that our concepts and justifications are no more than myth, we should also be ready to contribute to the lives of our communities and try to use our ideals to construct the best reality we can. This thesis is essentially an attempt to clear away some of the muddle that obstructs our view of those European ideals.

Part One

Perspectives

Chapter One

Perspectives

Introduction

Any study of the law of the European Union takes up a particular perspective, or perspectives, although few writers do so explicitly. One recent exception is Diarmuid Rossa Phelan, who settles himself firmly into what he calls an 'order approach' to EU law: "[t]he focus is on how the three legal orders of public international law, European constitutional law, and national law...describe themselves internally...".[1] Rossa Phelan contrasts this approach with other perspectives, amongst which he lists theoretical points of view: "this 'order approach' is an extension in the context of relations between legal orders of the internal approach to law, and is humbler than considering the other perspectives

[1] Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, p.3.

listed but has the advantage of trying to avoid the debates which surround perspectives of justification...and legal theories".[2]

This thesis, rather rashly, given Phelan's view, does not limit itself to Phelan's perspective but merrily leaps into the debates surrounding others. However, notwithstanding Phelan's "anti-theory" stance,[3] his own 'order approach' is situated squarely within legal theory. As MacCormick says, Phelan "chooses to ignore the extent to which his own position and approach belong firmly within theory; his way of dealing with the situation is not really to abandon theory, but to abstain from argument with theoretical positions other than his own".[4]

1.1 Three perspectives

In fact, Phelan's 'internal to the legal order' perspective is one of three perspectives (perspectives of legal theory) that will each be distinguished and discussed in this chapter, and then employed throughout the thesis. It will be given the somewhat unwieldy name of the *committed, normative perspective*. This point of view, however, will be argued to be not exclusive, but complementary to the other two, termed the *detached, normative perspective* and the *external perspective* respectively. Phelan rightly recognises that his order approach is concerned with questions of legitimation and legitimacy of the legal orders he studies; law, being normative, requires justification for its authority, and each of the three perspectives set out here offers a different angle from which to go on to study the legitimacy and authority of the law of the European Union.

In this chapter I explore these different perspectives. I show how the use of each perspective will automatically give rise to a particular type of understanding of law, and that without a recognition of theorists' use of different perspectives,

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[2] *Ibid.*, pp.3-4.

[3] See MacCormick, "Constitutional Pluralism in the European Union: Are Collisions Avoidable?", p.4.

[4] *Ibid.*

their arguments can never meet or properly engage. I take a look at the types of people who might use a particular perspective, and introduce some of the characters whose points of view will structure the rest of the chapters in this thesis, such as the legal scientist, critic, and judge.

1.2 The external perspective

All the theories considered in this thesis take as their starting point the ("perfectly correct")[5] appreciation of the fact that "where there is law, there human conduct is made in some sense non-optional or obligatory".[6] As Joseph Raz says, "[a]ll laws are created by human actions, but human actions are facts and they belong to the realm of the 'is', whereas laws are norms and belong to the realm of the 'ought'".[7] Law, in other words, is *normative*; any theory of law must offer an explanation of this property.

Theoretical accounts of the law vary, however, in the explanations they offer for the normativity of law, just as they vary in their accounts of other features of law. These variations in description derive from differences of opinion amongst descriptive theorists about "what is *important* and *significant* in the field of data and experience with which they are all equally and thoroughly familiar".[8] Finnis points out the 'obvious question' which these differences of opinion provoke: "From what viewpoint, and relative to what concerns, are *importance* and *significance* to be assessed?"[9]

One viewpoint will be termed the *external perspective*, which is the perspective of the outside observer. From the external point of view, the account of law that is

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[5] CL, p.82.

[6] *Ibid.*

[7] Raz, *The Authority of Law*, p.124.

[8] John Finnis, *Natural Law and Natural Rights*, p.9.

[9] *Ibid.*

given will be restricted to the outward manifestations of its existence: such an observer "is content merely to record the regularities of observable behaviour in which conformity with the rules partly consists and those further regularities, in the form of the hostile reaction, reproofs, or punishments, with which deviations from the rules are met".[10] Hart's reductive description of the external point of view is, however, misleading: this point of view is also the perspective of the sociologist, the anthropologist, and other schools of thought which study law as a social phenomenon as opposed to strictly normative.

Hart is however criticising Austin's attempt to give an account of the normativity of law from this external point of view. Austin defines the notion of a legal obligation in terms of the likelihood that one may come to harm - "a punishment or 'evil' at the hands of others in the event of disobedience".[11] In effect he treats the idea of obligation as being reducible to prediction, so that normative statements about the law (statements of duty and obligation) become assessments of the chances of incurring a sanction. According to Austin, in any society where there is law, therefore, there will exist a general *habit* of obedience.

Neil MacCormick adopts a well-known example of Hart's in order to demonstrate the inadequacy of this view:

> "By observation we discover that 99 per cent of car drivers stop their cars in front of red traffic lights. At the same time, the same observations disclose that 95 per cent of car drivers play car radios when stopped at traffic lights. Here we have two habits - a habit of car-stopping and a habit of radio-playing. As we all know, however, we have only one rule. It is a rule that

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[10] CL, p.89.

[11] CL, p.83, and see J. Austin, *The Province of Jurisprudence Determined*, Lecture One.

one must stop at red traffic lights. It is not a rule that one must play a car radio when stopped at a traffic light".[12]

An analysis of law as a normative phenomenon which confines itself to the external point of view thus produces serious distortions. Legal theory must take account of a second point of view, the point of view of the participants: "[w]e either have to be, or to put ourselves by sympathetic imagination in the shoes of, insiders to the practice in order to account for matters otherwise inexplicable".[13]

As is well known, Hart, concerned to refute theories of law which described law in purely behavioural terms, drew a distinction between what he called the internal and external aspect of rules. While a social rule has an external aspect which it shares with a social habit (the regular uniform behaviour which an observer can record) it also has an internal aspect, which is the understanding of a member of a group that the behaviour in question is a general standard which should be followed by the group as a whole.[14] His fundamental (and persuasive) objection against the predictive, purely external account of law, is that failure to fulfil the obligations imposed by law is not simply the ground for a prediction that sanctions will follow, but is a reason or justification for such reaction.[15] It is, after all, perfectly possible that a person may ignore a legal obligation but will not suffer a sanction for his disobedience. This does not affect the fact that he had and has an obligation, however; "the statement that an individual has an obligation under some rule and the prediction that he is likely to suffer for disobedience may diverge".[16]

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[12] MacCormick and Weinberger, *An Institutional Theory of Law*, p.130.

[13] *Ibid.*, p.131.

[14] CL, p.56.

[15] CL, p.84.

[16] CL, p.85..

Hart's strategy is therefore to adopt, at least ostensibly, the 'internal point of view' as his perspective on law, and therefore attempts to account for the obligatory nature of law in terms of what people believe to be reasons for action. I say 'ostensibly', however, because I will argue that while Hart's distinction between an external and an internal perspective is important, and shall be adopted in a modified form here, in discussing the normativity of law Hart himself falls back into a reductive position, and on to the external point of view.

1.3 The 'internal point of view'

Hart's theory of law is dependent upon an account of normativity which Raz calls the "practice theory of norms".[17] For Hart, the key to the obligatory nature of law is to be explained by the existence of social rules. To say that someone has or is under an obligation implies the existence of a social rule (although the inverse is not the case: the existence of a rule does not necessarily imply an obligation).[18] When do social rules exist? Briefly, according to Hart, the existence of social rules depends on the behaviour of the group to which the rule belongs. Rules are understood to impose obligations when there is an insistent general demand for conformity and when there is great social pressure brought to bear against those who deviate or threaten to deviate from them.[19] Social rules, therefore, are practices.

In the case of law, we therefore say that a legal rule is valid (that it imposes obligations) when it satisfies all the criteria provided by a particular rule of the

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[17] Raz, *Practical Reason and Norms* pp.49-58. Ronald Dworkin calls this the 'social rule theory' and gives a useful summary of Hart's position: "Duties exist when social rules exist providing for such duties. Such social rules exist when the practice-conditions for such rules are met. These practice-conditions are met when the members of a community behave in a certain way; this behavior constitutes a social rule, and imposes a duty...The existence of the social rule, and therefore the existence of the duty, is simply a matter of fact" (TRS, pp.49-50).

[18] CL, pp.85-6.

[19] CL, p,86, and see generally pp.82-91.

system which Hart calls the 'rule of recognition'.[20] The rule of recognition is different from the other rules (which it identifies) in that there is no rule providing criteria for the assessment of its own legal validity. The rule of recognition is, says Hart, neither valid nor invalid; it is simply accepted and used for the identification of the other rules of the system. The existence of the rule of recognition depends on an external statement of fact, in that it exists only "as a complex, but normally concordant, practice of the courts, officials and private persons in identifying the law by reference to certain criteria".[21] All legal rules are therefore practices.

An immediate and fundamental objection can be brought against this theory of Hart's, and Dworkin, MacCormick and Raz all do so.[22] They all query Hart's first step, his thesis that the existence of an obligation necessarily implies the existence of a social rule. It is not true, they argue, that all appeals to obligation are appeals to a social rule. Take the example of a vegetarian: she may argue that it is wrong to eat meat and that there is a general obligation not to kill animals for food, but she will acknowledge that (at least in Western societies) there is no social rule to that effect.

As a possible response to this criticism, Dworkin suggests that Hart could weaken his version of legal obligation to mean that it is simply *sometimes* the case that someone who asserts a duty should be understood as presupposing a social rule that provides for that duty.[23] It would be the case if the community were "by-and-large agreed that some such duty does exist".[24] However, even in this weakened form the social rule theory is not plausible. Firstly, it distorts people's

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[20] See CL, Ch. 6.

[21] CL, p.110.

[22] See TRS, pp.48-58; Raz, *Practical Reason and Norms*, pp.53-58; MacCormick, *H.L.A. Hart*, pp.30-33.

[23] TRS, p.52.

[24] *Ibid.*, p.53.

understanding of obligations that arise under 'concurrent morality'. A community "displays a concurrent morality when its members are agreed in asserting the same, or much the same, normative rule, but they do not count the fact of that agreement as an essential part of their grounds for asserting that rule".[25] For example, people may believe that they should not lie, and that they would have this duty even if most other people did lie. When they speak of a duty not to lie, it would be wrong to suppose them to be appealing to a social rule not to lie, since its existence is not necessary to their claim.[26]

Secondly, the social rule theory fails to explain the account that people give of their obligations even under 'conventional morality', the morality that a community displays when its members are agreed on a duty but that duty is only maintained so far as that agreement continues. It is not adequate because "it cannot explain the fact that even when people count a social practice as a necessary part of the grounds for asserting some duty, they may still disagree about the scope of that duty".[27] Hart's view is that a rule is constituted by being generally accepted by the officials of the system and obeyed by the bulk of the population, but this test presumes too much. This can be clearly seen in the case of the European Union, where the scope of various criteria which could be said to belong to the rule of recognition is not clear (for example, the power of the Member States to amend the Treaties in a way not provided for by the processes contained in the Treaties themselves).[28] Since two people whose rules differ cannot be appealing to the same social rule, it can only apply if it is accepted

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[25] *Ibid.*

[26] *Ibid.*

[27] *Ibid.*, p.54, and compare Raz, *Practical Reason and Norms*, pp.57-8.

[28] See da Cruz Vilaça and Piçarra, "Y a-t-il des limites matérielles à la révision des traités instituant les communautés européennes?".

that if a duty is controversial it is no duty at all[29] - which is to weaken the social rule theory to a form in which it becomes practically meaningless.

Dworkin argues that Hart's theory captures the truth that a social rule plays a crucial role in the justification of normative claims, but that it then makes the mistake of concluding that the social practice *constitutes* the rule which the normative judgment accepts. Instead, the social practice helps to *justify* a rule which the normative judgment states.[30] The problem at the root of Hart's practice theory of rules is that he fails to make the distinction that Kelsen draws between validity (normativity) and effectiveness. In avoiding the thesis that validity is entirely independent of effectiveness he goes to the opposite extreme and concludes that validity and effectiveness are the same.

There is clearly a relation between the 'ought' and the 'is' of the legal norm in that the norm must be created by an act "which exists in the reality of being".[31] However, as we have seen, norms may exist without being effective, which, in Hartian terms, means that norms (obligations and duties) may exist even if there is no social rule to that effect. As Kelsen says, the validity of a legal norm is not identical with its effectiveness: the effectiveness of a rule or legal order is not, contrary to Hart's view, the *reason* for the validity of the norm, although it may be a condition for it.[32] Hart is guilty of moving from the 'is' of the acceptance, or effectiveness, of an obligation, to the 'ought' contained within it. His theory of norms as practices may serve to identify the system to which a norm belongs, but it fails to explain the sense of 'legally ought' or 'ought according to law'.[33]

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[29] TRS, p.55.

[30] TRS, pp.56-7.

[31] PTL, p.211.

[32] PTL, pp.211-3. Kelsen argues that the validity of a norm ('ought') can only be another norm, not the fact of compliance, or an act of will, or any other 'is' (see PTL pp.4-10).

[33] See Raz, *Practical Reason and Norms*, p.175.

To recap, then, we have seen that Hart drew a distinction between two possible points of view from which to approach the study of law. To take the internal perspective is to be a participant in the group and to regard law as a reason for actions. To take the external perspective is to restrict oneself to behavioural accounts of law or descriptive accounts of people's beliefs and attitudes toward the law. Hart, in attempting to explain the obligatory nature of law, in effect took the latter perspective; his explanation of obligation in terms of the acceptance and use of the rule of recognition ultimately failed.

Dworkin's response to Hart's failure here is to embrace the first, internal perspective. He argues that the social scientist who wishes to study law (as opposed to the various opinions that people have about the law) must use the methods the participants use, and view the law from their perspective; "he must, that is, *join* the practice he proposes to understand".[34] For Dworkin, the primary internal point of view is that of the judge, which, he believes, should be adopted as the point of view of legal theory: "any judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden...Jurisprudence is the general part of adjudication, silent prologue to any decision at law".[35]

Dworkin is correct to emphasise the importance of the internal point of view. However, he is wrong to argue that it is the one and only perspective that should be adopted in the theoretical study of law. I will later argue that it is a mistake to adopt one point of view as exclusively correct, and that the different possible viewpoints should be recognised as complementary, each offering particular benefits and insights. For the moment, however, I will discuss a third position, which allows one to escape the 'internal external' dichotomy with

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[34] LE, p.64.

[35] LE, p.90.

which Hart and Dworkin present us. This position gives rise to what I will call (following Raz) 'detached normative statements'.[36]

1.4 The detached normative perspective

Raz's vegetarian friend helps us understand the nature of detached normative statements.

> "If I go with a vegetarian friend to a dinner party I may say to him, 'You should not eat this dish. It contains meat'. Not being a vegetarian I do not believe that the fact that the dish contains meat is a reason against eating it. I do not, therefore, believe that my friend has a reason to refrain from eating it, nor am I stating that he has. I am merely informing him what ought to be done from the point of view of a vegetarian. Of course the very same sentence can be used by a fellow vegetarian to state what ought to be done. But this is not what I am saying, as my friend who understands the situation will know".[37]

Detached normative statements are thus statements of the reasons there are from a certain point of view - here, the point of view of a vegetarian.

A person making detached normative statements does not accept the volitional aspect that is part of the Hartian internal point of view. It is MacCormick who identifies two components, cognitive and volitional, of the internal

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[36] The jump from 'point of view' to 'statement' is easily explained: a point of view can be characterised by the statements about obligation a person who accepts or is using that point of view will make. For example, a person who adopts the internal point of view with regard to the obligation not to lie, might say that "you ought not to lie". A person adopting the external point of view might say "you believe that you ought not to lie", or maybe "there is a rule that you ought not to lie". See Raz, "The Purity of the Pure Theory", at pp.90-9. Raz's terminology for these statements changes: in *The Authority of Law*, for example, he writes of 'statements from a point of view' (see pp.156-157). I find this label confusing and prefer 'detached normative statements'.

[37] Raz, *Practical Reason and Norms*, pp.175-176.

perspective.[38] The cognitive element is the understanding of the pattern or patterns of behaviour that community obligations create, and the volitional is the act of will of fulfilling the obligation, the preference for conformity to the pattern as a standard.[39] To approach law from the detached point of view entails a suspension of the volitional element - the friend in no way endorses the vegetarian's commitment to the obligation not to eat meat - while fully appreciating in the cognitive sense the commitment to the obligation that those with the internal point of view have.

The possibility of this third perspective introduces some confusion into Hart's terminology. It is actually a further point of view contained within Hart's category of the 'internal' perspective, the other being the fully volitional and cognitive. Hart's term 'the internal point of view' will thus be discarded. All three points of view have now been introduced, and I will clarify the way in which they will be classified. Firstly, the *external*, which, as we have seen, has neither the cognitive nor the volitional element: it can only go so far as to describe people's beliefs and attitudes toward their legal obligations. Secondly, people who make *committed normative* statements are those who accept the bindingness of the law and endorse it; they have the 'full-blooded' approach to norms.[40] The third point of view is that of the person who makes *detached normative* statements:[41] statements of what should be done according to a particular cognitive understanding of law.

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[38] See MacCormick, *Legal Reasoning and Legal Theory*, p.288, and *H.L.A. Hart*, p.33.

[39] MacCormick, *H.L.A. Hart*, p.38.

[40] See Raz, *The Authority of Law*, p.154 and p.159.

[41] MacCormick's terms this point of view the 'hermeneutic' perspective: see his discussion at pp.38-40 of *H.L.A. Hart*, and his discussion of the internal aspect of norms in the Appendix to *Legal Reasoning and Legal Theory* (pp.275-292). I prefer to stick with the term "detached normative statements" because Dworkin's thesis that explanations of law must take the point of view of the participants (i.e. the committed normative point of view) has also been labelled 'hermeneutic' - see Marmor, *Interpretation and Legal Theory*, pp.43-44.

It is important to see that the first two points of view are basic types. However, as Raz argues, the third is not collapsible into them.[42] Detached normative statements "simply state what one has reason to do from the legal point of view, namely, what ought to be done if legal norms are valid norms...They are like statements made on the assumption that something is the case, for example, that a certain scientific theory is valid, which are not conditionals of which the assumption is the antecedent, nor do they presuppose that the theory is true".[43] This description of detached normative statements finds echoes in Kelsen's doctrine of the basic norm, and Raz acknowledges his debt to Kelsen in identifying and developing the understanding of this third perspective.

The implications of the third perspective can be seen in Kelsen's example of an anarchist law professor: "Even an anarchist, if he were a professor of law, could describe positive law as a system of valid law, without having to approve of this law".[44] Detached normative statements are to be distinguished further from committed normative statements in that they are scientific as opposed to personal: whereas norms judged as normative from a personal point of view are those endorsed and adopted as just, norms can also be judged as normative, even by the same person, from the scientific point of view which makes no such moral judgment. This alters the impact of the Hart-Dworkin debate on the nature of legal obligation that we looked at earlier.

We saw that Dworkin objected to Hart's account of the normativity of law. Dworkin sets out his opposition to Hart (and also to positivism, since he takes Hart to be the target in his "general attack on positivism")[45] in terms of three different theses regarding the idea of a fundamental test for law. (i) The first thesis holds that in a legal system some *social* rule or set of social rules exists

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[42] Raz, *Practical Reason and Norms*, pp.172-175.

[43] *Ibid.*, p.175.

[44] PTL, p.218n., and see Raz's discussion in *The Authority of Law*, pp.155-156.

[45] TRS, p.22.

within the community of its judges and officials, which rules settle the limits of the judge's duty to recognize any other rule or principle as law.[46] (ii) According to the second thesis, in every legal system some particular *normative* rule or principle, or complex set of these, is the proper standard for judges to use in identifying more particular rules or principles of law.[47] (iii) The third thesis holds that in each legal system most of the judges accept *some* normative rule or theory governing their duty to count other standards as legal standards.[48]

Dworkin believes the dispute between himself and Hart (himself and positivism) to hang on the first thesis: Hart proposes it, he denies it. However, the fact that the arguments Dworkin offers for rejecting Hart's version of positivism are convincing does not mean that Dworkin's 'rights thesis' is the only alternative. Dworkin is committed to some version of the second thesis, that there is some normative, not social, rule or principle used in identifying other legal obligations. Yet this thesis can also be accepted by Kelsen, whose pure theory, he tells us, is a theory of legal positivism.[49]

It may help to set out a summary of the basic tenets traditionally associated with positivism. Raz identifies three major theses, which may be termed the semantic thesis, the moral thesis and the sources thesis:[50]

> "First is the reductive semantic thesis which proposes a reductive analysis of legal statements according to which they are non-normative, descriptive statements of one kind or another. Second is the contingent connection thesis according to which there is no connection between law and moral

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[46] TRS, pp.59-60.

[47] TRS, p.60.

[48] *Ibid.*

[49] PTL, p.106.

[50] Cf. Raz, *The Authority of Law*, p.37, and "The Purity of the Pure Theory", pp.81-2. As Hart says, there are several meanings of positivism "bandied about" in contemporary jurisprudence. He, in contrast with Raz, identifies five (in *Essays in Jurisprudence and Philosophy*, at pp.57-58). See also Dworkin's list in TRS (p.17).

values. Third is the sources thesis which claims that the identification of the existence and content of law does not require resort to any moral argument".[51]

The first thesis, which includes the Hartian social rule thesis that Dworkin argues against, is however rejected by Kelsen.

Kelsen's account of normativity is very different from the theory of 'social normativity' offered by Hart.[52] He adheres to what Raz calls a 'justified' concept of legal obligation, according to which legal standards of behaviour are norms only if and in so far as they are justified,[53] a concept which corresponds to Dworkin's second thesis. This is possible because Kelsen's fundamental test for law (the Grundnorm) does not dissolve, unlike Hart's Rule of Recognition, into the external point of view. However, neither does it take Dworkin's perspective of the committed participant. Instead, it offers a detached normative viewpoint from which to understand law.

Kelsen agrees with Dworkin that from the point of view of the participants, law ought to be conceived as justified, or moral.[54] Kelsen's Grundnorm is not a doctrine of recognition; it is not a positive but a *presupposed* norm, which is only presupposed if we wish to interpret law (as social practice) as normative.[55] There

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[51] Raz, "The Purity of the Pure Theory", pp.81-82.

[52] Raz's term 'social normativity' is summarised by him as the view that standards of behaviour "are social norms in so far as they are socially upheld as binding standards and in so far as the society involved exerts pressure on people to whom the standards apply to conform to them" (*The Authority of Law*, p.134). This essentially corresponds to Hart's position, although in the light of the criticisms considered above, which argue that it fails to explain the nature of a legal obligation, it would seem to be somewhat of a misnomer to label it the social conception of the normativity of law.

[53] Raz, *The Authority of Law*, p.134. Kelsen's views on the normativity of law are restated but also reconstructed by Raz (in *The Authority of Law*, Chapters 7 and 8, *The Concept of a Legal System*, pp.45-50, and in "The Purity of the Pure Theory"). The presentation of them here draws heavily upon Raz's work.

[54] See Raz, *The Authority of Law*, p.138, and cf. Marmor, *Interpretation and Legal Theory*, p.42.

[55] PTL, pp.199-200. Kelsen's doctrine of the Grundnorm is discussed in greater detail below.

is no *necessity* to presuppose the Grundnorm: an anarchist, for example, reasoning in his personal capacity, would in fact refuse to presuppose it. For him, there is no difference between the commands of a gangster and the 'obligations' imposed by law: they are both to be interpreted as simply power relations (that is, "relations between commanding and obeying or disobeying human beings")[56] - in other words, interpreted sociologically, not juristically.[57] If an individual does presuppose the Grundnorm, however, that individual interprets it not only as normative but also as just.

Yet the anarchist may also be a law professor, and in his professional capacity he can presuppose the Grundnorm in a special, scientific way. This scientific point of view is, for Kelsen and Raz, the point of view of legal theory, and it is here that Dworkin diverges from them. While Dworkin identifies the point of view of the legal theorist with the committed point of view, Kelsen and Raz turn to the third possibility, the possibility of making *detached* normative statements about the law. The legal theorist, along with the legal practitioner and law professor acting in their professional capacities, can make legal judgments that do not have moral (volitional) force.[58] It is in this way that legal theory is able to offer a 'value-free' account of law, based on the positivist sources thesis and the moral thesis, while at the same time explaining its normativity.[59]

To anticipate later chapters slightly, the justified account of normativity found in Raz's reconstructed Kelsen allows, for example, an account of the authority of the European Union from the detached point of view. It is possible to view the relationships between the international, Member State and Union legal orders not just from the committed point of view of a participant in one of

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[56] PTL, p.218.

[57] *Ibid.*, and see GTLS, p.413.

[58] Cf. Raz, *The Concept of a Legal System*, p.236; *Practical Reason and Norms*, p.177; *The Authority of Law*, p.142; "The Purity of the Pure Theory", p.90.

[59] Dworkin does not accept this claim however; his arguments against the positivist 'value-free' approach to law will be considered below.

those orders, but also to step back to the professional perspective of legal science and view them neutrally. The Kelsenian third class of legal statements allows legal theory to step back from the fray and set out the competing interpretations of legal practice without competing itself.

Another strength of Kelsen's approach is that different points of view are understood to be complementary. He himself demarcates his own field of inquiry as 'normative jurisprudence', by which he means "cognition directed toward a legal 'ought'", as opposed to 'sociological jurisprudence', which is "cognition directed toward an actual 'is'".[60] But "sociological jurisprudence stands side by side with normative jurisprudence; neither is able to replace the other because each deals with different problems".[61] Cotterrell for one applauds the clear, rigorous manner in which Kelsen recognised the partial nature of his own perspective, and the way in which he "came to accept sociology of law as a parallel but quite distinct enterprise of inquiry about the legal field, alongside what he viewed as legal science - the normative analysis of legal doctrine guided by the concepts of the pure theory of law".[62]

The relation between different viewpoints is, however, not one of complete autonomy. Kelsen points out that sociological jurisprudence (which would correspond to our 'external point of view') presupposes normative jurisprudence (corresponding to the detached normative viewpoint):

> "Only by referring the human behavior to law as a system of valid norms, to law as defined by normative jurisprudence, is sociological jurisprudence able to delimit its specific object from that of general sociology; only by this reference is it possible to distinguish sociologically between the

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[60] Kelsen, *What is Justice?*, p.269.

[61] Kelsen, *ibid.* See also the general discussion in GTLS, pp.162-178.

[62] Cotterrell, *The Politics of Jurisprudence*, p.230. See also Raz, "The Purity of the Pure Theory", pp.80-81, where he especially approves Kelsen's insistence on the autonomy and distinctiveness of normative concepts.

phenomenon of legal and the phenomenon of illegal behavior, between the State and a gang of racketeers".[63]

Similarly the detached normative point of view is dependent upon the existence of the committed normative point of view. This relation of dependency between perspectives, and particularly the detached and committed perspectives, will be discussed below. First, we must return to Dworkin's view that the detached view is in any case not possible and that legal theory cannot be uncommitted.

1.5 Dworkin's rejection of the detached normative perspective

Dworkin does distinguish between the external point of view "of the sociologist or historian"[64] and the internal point of view of the participants of law.[65] He accepts that "[b]oth perspectives on law, the external and internal, are essential, and each must embrace or take account of the other".[66] He himself takes up the internal, participant's point of view: he "tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issues of soundness and truth participants face".[67] This is all well and good: as Hart puts it, his ideas "are of great interest and importance as contributions to an evaluative justificatory jurisprudence", contributions which Hart is "not concerned to dispute".[68]

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[63] GTLS, p.177, and see p.178: "sociological jurisprudence presupposes the juristic concept of law, the concept of law defined by normative jurisprudence".

[64] LE, p.13.

[65] *Ibid.*, p.14.

[66] *Ibid.*, pp.13-14.

[67] *Ibid.*, p.14.

[68] CL, Postscript, at p.241.

What Hart is concerned to dispute, however, and what will be disputed here, is Dworkin's claim that positivist legal theory can be illuminatingly re-stated as an interpretive theory.[69] Dworkin argues that since legal practice is argumentative, "every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice".[70] He therefore proposes a theory of law as interpretation, in which people try and understand law "in its best light".[71] However, interpretation is not limited to the participant but extends also to the legal philosopher:

> "General theories of law...must be abstract because they aim to interpret the main point and structure of legal practice...But for all their abstraction, they are constructive interpretations: they try to show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice. So no firm line divides jurisprudence from adjudication or any other aspect of legal practice".[72]

So a positivist theory of law becomes, for Dworkin, a concept of law based on a particular normative political theory which must be tested for its interpretive power just as his own theory of law as integrity must be tested.[73]

Dworkin therefore refuses to distinguish between the interpretation of 'the law', in the sense of a particular body of law, and the interpretation of 'law', in the sense of the general concept of law.[74] Marmor adapts Raz's example of the vegetarian to demonstrate Dworkin's position with regard to this point. Suppose

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[69] *Ibid.*

[70] LE, p.13.

[71] LE, p.47.

[72] LE, p.90.

[73] See Dworkin, "A Reply by Ronald Dworkin", in Cohen (ed.), *Ronald Dworkin and Contemporary Jurisprudence*, at pp.254-256.

[74] See Finnis, "On Reason and Authority in Law's Empire", at p.368.

that there is controversy amongst vegetarians whether fish should or should not be eaten, and that this controversy is due to different conceptions vegetarians hold on the requirements of vegetarianism. Dworkin "would argue that both the participants and the theorists would have to decide what vegetarianism 'really requires', that is, in such a way as to present it in its best light".[75] He denies, in other words, that the theorists could take a different point of view from that of the committed, normative viewpoint of the participants.

This position, however, is not plausible, and I will set out three arguments to that effect. As a preliminary though it must be clarified that Dworkin's claim that the participants in a social practice must offer competing interpretations of that practice is not at issue here. In fact it will later be argued that Dworkin has much to offer as far as his account develops our understanding of the committed, normative perspective on law. What is at issue is Dworkin's argument that jurisprudence, or legal theory, is best regarded as an interpretive activity which approaches law from the same point of view as a participant.

Michael Moore attacks Dworkin on his 'metaphysical' flank. He argues that Dworkin's interpretive claim about jurisprudence "is intimately connected to his ultimately antimetaphysical stance; and both fail for the same reason".[76] Dworkin, he argues, adopts Richard Rorty's understanding of the internal and external points of view. Rorty argues that philosophy has no privileged position from which it can judge the culture within which it is situated; it occupies no "Archimedean point from which to survey culture".[77] Furthermore, no discipline can occupy such a position - its standards will always be internal. "It is impossible", Rorty tells us, "to step outside our skins - the traditions, linguistic and other, within which we do our thinking and self-criticism - and compare

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[75] Marmor, *Interpretation and Legal Theory*, p.50, referring also to Dworkin, LE, p.64.

[76] Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?", p.942.

[77] Richard Rorty, *Philosophy and the Mirror of Nature*, 1979, quoted by Moore, *op. cit.*, p.953.

ourselves with something absolute".[78] It is these arguments that Dworkin relies upon when he claims that each interpretive practice must be judged internally.[79] Moore suggests, however, that Rorty's arguments are unavailable to Dworkin, who is considering law, not philosophy:

> "The plausibility of Rorty's use of the 'impossibility of the external' argument depends wholly on Rorty's application of it to our knowledge *as a whole*. Once Dworkin applies the argument to discrete interpretive practices, it loses that plausibility".[80]

Dworkin, argues Moore, must abandon his conclusion that external criticism of claims made within interpretive practices is senseless.[81]

Raz and MacCormick similarly criticise Dworkin's interpretive claim about jurisprudence, although on different grounds. Dworkin tells us that in interpreting law (whether as participants or as legal theorists) we must construct the theory of political morality that best fits and justifies our legal practices. MacCormick, suggesting that this theory might be termed a theory of 'institutional morality', replies that Dworkin has failed to adequately reply to a crucial question. "Put with more rhetorical force than grammatical elegance, the question is: what is institutional morality the morality *of*?"[82] The "soft underbelly" of Dworkin's thesis is that "if we have to refer to certain institutions so as to filter out of background morality a set of principles which 'fit' the said institutions in the sense of giving their best possible justification, then it follows that some procedure must exist identifying the institutions

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[78] Richard Rorty, *Consequences of Pragmatism*, 1982, quoted by Moore, *op. cit.*, p.953.

[79] See Moore, *op. cit.*, p.953.

[80] Moore, *op. cit.*, p.954.

[81] *Ibid.*

[82] MacCormick, *An Institutional Theory of Law*, p.179.

independently of either background morality or *a fortiori* institutional morality".[83]

Raz suggests that Dworkin's theory as presented in *A Matter of Principle* implies the acceptance of "something that is at least like the Rule of Recognition as a necessary means for the identification of legal sources".[84] And in fact, in *Law's Empire* Dworkin introduces the concept of the 'preinterpretive stage', in which "the rules and standards taken to provide the tentative content of the practice are identified".[85] Yet the only criterion for identification he offers is that "a very great degree of consensus is needed".[86] Dworkin fails to recognise that the identification of law at the preinterpretive stage does not entail the interpretation of the law as a specific legal culture but relies on an understanding of the concept of law which is detached from that committed viewpoint.

The incompatibility between Dworkin's interpretive claim about jurisprudence and his characterisation of the 'preinterpretive stage' can be seen in his discussion of wicked law. He says that a person does not have to deny that the Nazis did have law, even if his interpretation of his own law is based on some feature the Nazi regime wholly lacked, because he would be able to mean only that it was law in the 'preinterpretive' sense.[87] If he then goes on to say that Nazi law was "not really" law, he is using 'law' in a different way: "he is not making that sort of preinterpretive judgment but a skeptical interpretive judgment that Nazi law lacked features crucial to flourishing legal systems whose rules and procedures do justify coercion".[88] Yet what is this but the use of two different perspectives from which to view law? Dworkin describes the

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[83] *Ibid.*, p.180.

[84] Raz, "Dworkin: A New Link in the Chain", p.1109.

[85] LE, pp.65-66.

[86] LE, p.66.

[87] LE, p.103.

[88] LE, p.104.

preinterpretive judgment about Nazi law as meaning that the Nazi system "can be recognized as a strand in the rope, one historical realization of the general practices and institutions from which our own legal culture also developed".[89] This is precisely the sort of judgment which is detached from a particular legal culture and which should be distinguished from the interpretation offered by the committed perspective on law.

MacCormick concludes that Dworkin's interpretive approach turns out to need completion rather than abandonment of the analytical inquiry of the positivists,[90] and Hart joins him, arguing that Dworkin's characterization of legal theory as a normative justificatory enterprise "unfortunately conceals the fact that there is a standing need for a form of legal theory or jurisprudence that is descriptive and general in scope",[91] which need Dworkin's underdeveloped 'preinterpretive stage' fails to satisfy. Suppose we concede Dworkin's thesis that interpretation should strive to present its object in the best light. It may be true that for the participants in a practice like law this would mean 'morally' best - but this is because the participants must regard law as *a reason* for their actions. This does not necessarily hold for legal theory: assessing 'the best' depends upon the purposes of the theory.[92]

This becomes clear once we consider Hart's emphatic denial that his theory ever makes any claim to identify the point and purpose of law and legal practices as such,[93] contrary to Dworkin's presupposition that the point and

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[89] LE, p.103.

[90] MacCormick, *An Institutional Theory of Law*, p.186.

[91] Hart, "Comment", p.36, and see generally pp.36-40.

[92] See Marmor, *Interpretation and Legal Theory*, p.57, and cf. Moore, "The Interpretive Turn in Modern Theory: A Turn for the Worse?", pp.947-948, where he argues that while legal practice is interpretive because of the moral fact that there is some set of values served by granting authority to past political decisions, jurisprudence is not because there is no point making the practices of judges authoritative for legal theorists. See also the discussion of the committed normative viewpoint below.

[93] CL, Postscript, p.248.

purpose of law and legal practice is to justify the collective force of the state (coercion).[94] As we saw above, Hart declines to dispute what he sees as the parts of Dworkin's theory which contribute to a type of legal theory with aims that are not his own (evaluative justificatory jurisprudence). Thus the third argument against Dworkin's conflation of the points of view of the legal theorist and participant focuses upon the different sorts of intellectual enterprise in which writers such as Dworkin and Hart are engaged. This argument is summed up by John Finnis:

> "[T]he objective and methods of a general descriptive and analytical jurisprudence such as Hart's or Raz's are to be clearly distinguished from the objective and methods of a 'legal theory' as conceived by R. M. Dworkin... [Dworkin's] debate with 'positivists' such as Hart and Raz miscarries, because he fails to acknowledge that their theoretical interest is not, like his, to identify a fundamental 'test for law' in order to identify (even in the most disputed 'hard' cases) where a judge's legal (moral and political) duty really lies, in a given community at a given time. Rather, their interest is in describing what is treated (i.e. accepted and effective) as law in a given community at a given time...".[95]

It is precisely the possibility of differing projects within legal theory which Dworkin ignores: in denying the availability of the detached normative point of view, he obscures the differing purposes that legal theory may serve.

However, although Dworkin's exclusive adoption of the participant's committed, normative point of view as the point of view of legal theory must be rejected, this does not detract from its importance as one of the three perspectives from which to approach law. In fact, the committed, normative perspective is arguably the most important of them all. As we saw, the external

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[94] See LE, p.97; cf. p.117.

[95] Finnis, *Natural Law and Natural Rights*, p.21.

viewpoint presupposed the existence of the detached, normative viewpoint. But the detached, normative viewpoint in turn presupposes the committed - after all, it must be detached from something. It is time to look more closely at this 'full-blooded' perspective.

1.6 The committed normative perspective

The committed, normative statement is the primary kind of legal statement, upon which the detached, normative statements of legal science are parasitic.[96] Although normative language is used in both, it is in the committed statements that the idea of an obligation is expressed in the way to which we are most accustomed, since committed statements "are those of ordinary people who use normative language when stating the law because they believe or purport to believe in its binding force".[97] In Hartian terms, the committed normative viewpoint is the viewpoint of those people who hold a " reflective, critical attitude"[98] toward the law; people who accept the law as providing a guide for their conduct.[99] This attitude is manifested in the use of law as a common standard of behaviour, criticism (including self-criticism), demands for conformity, and in acknowledgments that this criticism and these demands are justified.[100]

As we saw above, this reflective, critical attitude comprehends both a cognitive and volitional commitment.[101] I will divide the discussion into two types of situation in which both the cognitive and volitional commitment are present.

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[96] See Raz, *The Authority of Law*, pp.158-9; Finnis, *Natural Law and Natural Rights*, p.14 and pp.235-6; MacCormick, *H.L.A. Hart*, p.39 and *Legal Reasoning and Legal Theory*, p.292.

[97] Raz, "The Purity of the Pure Theory", p.90.

[98] CL, p.55.

[99] CL, Postscript, p.242.

[100] CL, p.56.

[101] MacCormick, *H.L.A. Hart*, p.33.

The first is that of the individual who looks to norms of law as reasons for action. The second is that of the judge who interprets and applies the law. As will be seen, both the individual and the judge are seeking *justification* of their decisions and actions, but the nature of that justification is not necessarily the same in both situations.[102]

1.6.1 The individual

By 'individual', I mean the person who is looking at the law from a personal, as opposed to professional, point of view. For the individual, the choice to 'join the practice of law', as Dworkin puts it, is far riskier than the choice made by the legal theorist; jurisprudence, in fact, is only a reflection upon choosing, while the choice that the participants themselves make is a choice "to authorise or withhold, or to risk or accept, coercion - and take the consequences".[103] Thus it is perfectly possible not to 'join the practice' - Kelsen's examples of the anarchist[104] and the communist are instances of individuals who refuse to accept the authority and normativity of law:

> "A Communist may, indeed, not admit that there is an essential difference between an organization of gangsters and a capitalistic legal order which he considers as the means of ruthless exploitation...He does not deny that the capitalistic coercive order is the law of the State. What he denies is that this coercive order, the law of the State, is objectively valid".[105]

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[102] This is also another point of contrast with the point of view of the legal theorist or the lawyer, who need not necessarily justify any real decision or action. See Nino, "A Philosophical Reconstruction of Judicial Review", p.814.

[103] Finnis, "On Reason and Authority in Law's Empire", p.357.

[104] See Kelsen, GTLS, p.413; *What is Justice?*, pp.226-7. The anarchist law professor is discussed above; here we are discussing the anarchist in his personal, not professional, capacity.

[105] Kelsen, "Professor Stone and the Pure Theory of Law", p.1144.

Since for an individual to accept the law as imposing obligations upon her entails incorporating the law into her personal morality, or personal scheme of reasons for action, it is clear that a communist or a person who believes the law to be iniquitous will refuse to do this.

Hart, however, disagrees that an individual's committed, normative perspective on law entails a moral commitment. He points out that participants may accept obligations for many different reasons, such as "deference to tradition or the wish to identify with others or in the belief that society knows best what is to the advantage of individuals".[106] Thus when the question arises why people have accepted law as a guide to their conduct, Hart sees "no reason for selecting from the many answers to be given a belief in the moral justification of the rules as the sole possible or adequate answer".[107] For Hart, committed normative statements are normative only because they express a willingness to be guided in a certain way.[108]

Raz objects to Hart's position here on the grounds that much legal discourse is not about one's own obligations but also about the rights and duties of others.

> "While one can accept the law as a guide for one's own behaviour for reasons of one's own personal preferences or of self-interest one cannot adduce one's preferences or one's self-interest by themselves as justification for holding that other people must, or have a duty to, act in a certain way. To claim that another has to act in my interest is normally to make a moral claim about his moral obligations".[109]

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[106] CL, Postscript, p.257.

[107] *Ibid.*

[108] Raz, "The Purity of the Pure Theory", p.92.

[109] *Ibid.*, pp.92-93.

Raz, therefore, finds it "impossible to resist the conclusion that most internal or committed legal statements, at any rate about the rights and duties of others, are moral claims".[110]

There are two further arguments which may reinforce Raz's hesitant conclusion here. The first expands upon Raz's concern about the effect of the acceptance of law upon the rights and duties of others, and explains why, without challenging Hart's understanding of the normativity of law, an individual's acceptance of the law includes a moral commitment. Hart's account of law as being constituted by social rules and his doctrine of the rule of recognition include the claim that the law only imposes obligations if it is effectively accepted as common public standards of behaviour by its officials. This condition does not only entail acceptance by 'officials'; it entails acceptance by 'enough' individuals to maintain the general effectiveness of the law. So an individual's commitment to the law is not the simple expression of a preference that extends only to herself. Her commitment becomes part of the underpinnings of the law as a body of obligations which will be enforced against the other members of the community, whether they accept it or not. As such it is a moral judgment that their behaviour (and her own) should conform to the obligations of law rather than other obligations that they (or she) feel could also be binding upon them.

The second argument is independent of the effect upon others of one's commitment to law. People who accept the law as valid accept the law's claim to priority: they will view law as providing reasons for actions that override or exclude other reasons for action.[111] The law can be said to have a 'peremptory'

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[110] *Ibid.*, p.93. Raz is careful to add in a footnote that he is "not saying that people that make such statements have the moral beliefs they express. They may be insincere".

[111] See Raz, *Practical Reason and Norms*, pp.141-146, where he discusses the way in which the law excludes the application of extra-legal reasons in deciding what, according to law, ought to be done.

nature:[112] as Finnis puts it, the law "anticipates and seeks to capitalize upon, indeed to absorb and take over, the 'good citizen's' schema of practical reasoning, and to give it an unquestioned or dogmatic status".[113] However, in doing so, it will almost inevitably compete or even come into conflict with other normative systems which claim to impose obligations on individuals, such as norms of religion or, more generally, morality. The individual, in viewing the law as normative and its prescriptions as obligations to be obeyed, excludes any other norm, such as norms of morality, which claim to govern behaviour which is simultaneously governed by law. So the commitment to law is moral, since it may involve the rejection of certain norms of morality; at the least it will alter the way and the extent to which morality may have an effect upon that individual's behaviour.[114]

Hart's argument that people accept the law for many different reasons does not refute the argument that their acceptance is nevertheless essentially moral. He simply supplies examples of cases in which people make moral decisions without considering the moral reasons for making them, or in which their moral decisions are morally objectionable. This may become clearer if we imagine the many situations in which a legal norm might impose an obligation which many people would find evil. There may be, for example, a law which forbids employers to hire people of a certain race. An employer in this situation may accept this law because she stands to make a profit in doing so, or for whatever other reason. Moral reasons why she should not accept this law might not even cross her mind. However, her failure to consider moral reasons for accepting the law, or her abdication from moral reasoning, do not alter the moral nature of

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[112] MacCormick, "Comment" p.111.

[113] Finnis, *Natural Law and Natural Rights*, p.318.

[114] A similar argument is also put by MacCormick, albeit in slightly different terms: "There is a necessary connection between law and morality: they connect by virtue of both being modes of exercise of practical reason" ("The Separation of Law and Morals", in George (ed.), *Natural Law Theory*, p.120).

her decision: she has rejected or ignored morality in acting in a way that morality may claim to forbid.

Therefore the individual who makes the volitional commitment to law does make a moral commitment. The law becomes embedded in the moral beliefs of that person and to accept the law means to accept it as just. It is in this sense that Kelsen says that the communist denies that the law is 'objectively valid': he denies the 'ought' of the legal norm. From the point of view of an individual the law is an ideology, although it differs from other ideologies in that it corresponds to certain facts of reality - the effectiveness of the system of law as a whole. (In this way, Kelsen suggests, "the law may be considered as the specific ideology of a certain historically given power".)[115] Accepting the law as valid entails adopting the law as part of one's personal ideology or morality.

This means that from the individual's committed point of view, morality and law must form one, consistent, unified order:

> "To consider law and morality from one and the same point of view as valid orders, or, what amounts to the same thing, to accept law and morality as simultaneously valid system, means to assume the existence of a single system comprehending both".[116]

While a jurist can ignore morality and a moralist can ignore positive law, an individual, who must decide what she ought to do, cannot treat both morality and law as two different valid systems, since both systems are related to the same object - her conduct[117] - and they may both make conflicting claims upon her behaviour. If law prescribes conduct A for her, and her moral beliefs prescribe

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[115] Kelsen, *What is Justice?*, p.227. Kelsen also discusses the idea of law as an ideology in PTL, pp.104-7, where he is careful to point out that the Pure Theory, however, takes an anti-ideological stance (p.106). Cf. Tur, "The Kelsenian Enterprise", p.179, and Raz, *The Authority of Law*, p.136.

[116] GTLS, p.374.

[117] See GTLS, p.399.

conduct non-A, it is logically impossible for her to treat both law and morality as normative.[118] As Kelsen says, no one can serve two masters.[119]

To the individual, therefore, legal and non-legal norms will all form part of her personal normative system, based upon her personal point of view.[120] It may be true that she thinks that some of the norms which she believes to be valid conflict, and she feels herself to be torn between two opposing obligations, but this is not a normative but a psychological fact.[121] In accepting law as a guide for her conduct and a basis for criticism, the individual makes a moral commitment which joins law and morality into the one body of norms which she accepts impose obligations upon her, and which justify her acts when she behaves in accordance with them.

1.6.2 The judge

The judge, also, must give decisions and apply the law in a way which is justified because in accordance with her obligations. However, the question of the nature of the obligations to which the judge is subject is hotly contested. Clearly there are differences between the situation of the individual interpreting the law as normative and deciding what she personally must do, and the situation of the judge interpreting the law as normative and deciding what the parties to a case must do. One obvious difference is that the judge's interpretation is authentic, in that it creates law, while the individual's choice is not: it always runs the risk of being found erroneous by the judge.[122]

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[118] See GTLS, pp.407-8; What is Justice?, p.284.

[119] PTL, p.329. See also Dworkin, "Comments on the Unity of Law Doctrine", p.201, who defends Kelsen against Hart on this point.

[120] See Raz, *The Authority of Law*, p.143.

[121] See GTLS, p.375, and Raz, *The Authority of Law*, p.138.

[122] PTL, pp.354-355.

Kelsen describes the process of interpretation of the law as being divided into two stages. First comes the "cognitive ascertainment of the meaning of the object to be interpreted", which in the case of law is "the ascertainment of the frame which the law that is to be interpreted represents, and thereby the cognition of several possibilities within the frame".[123] Kelsen's position is that every law-applying act is partly determined by law and partly undetermined;[124] it is the determinate law which provides the 'frame' within which the law is indeterminate. This stage reflects the normative detached perspective, which as cognition of law without volition must exhibit all possible meanings of a legal norm, without deciding between the possibilities exhibited by it.[125]

The judge, however, must choose: "the creation of an individual norm, within the frame of a general norm in the process of applying the law, is a function of the will".[126] The judge, like the individual, makes the volitional step that is part of the committed normative point of view. Kelsen argues that this volitional step is constrained by the frame identified at the cognitive stage, but that in choosing between different meanings of a legal norm within that frame, the judge turns to political norms: inside the frame the judge's task "is not cognition of positive law, but of other norms that may flow here into the process of law-creation - such as norms of morals, of justice, constituting social values...".[127]

Kelsen's account of the way in which a judge goes about making a decision is controversial, but his contention that the judge in interpreting the obligations that the law imposes eventually must turn to norms which are not legal highlights the fulcrum of the debate about the nature of the judicial commitment to law. The judge cannot be detached: she must choose, as Kelsen

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123 *Ibid.*, p.351.

124 *Ibid.*, p.349.

125 *Ibid.*, p.355.

126 *Ibid.*, p.353.

127 *Ibid.*, p.353, and see Kelsen, *What is Justice?*, p.368.

says, between different possibilities that may be open to her. But is the judge free, as the individual is, to consider what her obligations are 'all things considered'? When the individual justifies her actions, she will refer to her 'personal normative system', which may well contain norms of morality as well as of law. However, we intuitively revolt against the idea that the judge (who, after all, could be an anarchist friend of Kelsen's law professor) looks in this way to her personal moral beliefs to justify her decision.

We revolt against this idea because the judge's endorsement of the law as normative is not the endorsement simply of one more individual: in her role as a judge, she is making a public and authoritative claim to its correctness. The difference between morality as manifested in legal practice and morality as displayed in moral life lies, MacCormick tells us, "in the elements of publicity, authority, and determinacy special to law".[128] However, in the judge's endorsement of the law as justifiably imposing obligations upon its subjects, the question remains as to the nature of the commitment the judge is making: to what extent (if at all) is she making a moral claim similar to that of an individual?

Hart again says that the commitment to law is not moral. He recognizes that his Rule of Recognition, if it is to exist at all, must be regarded by the courts "from the internal point of view as a public, common standard of correct judicial decision, and not as something which each judge merely obeys for his part only".[129] However, in his opinion, "when judges or others make committed statements of legal obligation it is not the case that they must necessarily believe or pretend to believe that they are referring to a species of moral obligation".[130] Relying on his view that rights, duties and obligations have different meanings

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[128] MacCormick, "The Separation of Law and Morals", p.119. MacCormick refers to 'practical reason' rather than morality; I will return to the concept of practical reason later, with reference to Finnis.

[129] CL, p.116.

in moral and legal contexts, he argues that judges speak in a technically confined way: judicial statements of a subject's legal duties set out the action that is 'owed' by the subject but "have nothing directly to do with the subject's reasons for action".[131]

However, just as Hart's thesis was rejected in relation to the individual, it should also be rejected in relation to the judge. He seems to confuse the question of the norms according to which a judge should make a decision and the question of whether or not to view the norms as imposing obligations. Judges do not necessarily deny that there may be reasons outside the law which bear on an individual's action; they may even believe that there are other reasons which, all things considered, justify his action. However, they may condemn it because theirs is a judgment from the legal point of view only, which is the point of view from which laws are exclusionary reasons (in that all non-legal reasons are disregarded except where the law permits people to act on non-legal reasons).[132] In this sense it is true that judges do not make moral decisions, meaning decisions according to the criteria of 'all things considered'.

However, the judge must make a preliminary decision whether or not to take up the legal point of view, and this decision, I would argue (following in particular MacCormick's reasoning),[133] is not morally neutral. The decision to accept the legal point of view entails a commitment to the 'peremptoriness' of law, a commitment to treating as wrong what law characterizes as wrong conduct, "even if in a concrete case the soundest moral judgement might be

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[130] Hart, *Essays on Bentham*, p.161.

[131] *Ibid.*, pp.266-267, and see MacCormick, "Comment", p.111.

[132] See Raz, *Practical Reason and Norms*, pp.170-171. Cf. Finnis, *Natural Law and Natural Rights*, pp.314-320, where he draws a very similar distinction between what he terms the legal sense and the moral sense of 'legally obligatory'.

[133] See in particular MacCormick, "Comment", and "The Separation of Law and Morals". See also Postema, "The Normativity of Law", who also argues against Hart's understanding of the obligation of the judge.

that, all things considered, there was nothing wrong either in doing the deed the law characterizes as wrong, or in breaking the law by doing that deed".[134]

Again Hart argues that judges may have many different motives for making that commitment, motives which have nothing to do with the belief in the moral legitimacy of the authority whose enactments they identify and apply as law.[135] Again, this is not to be doubted. MacCormick, however, explains why this does not detract from the fact that the judge is making a moral commitment:

"[T]he judicial pretension to justification in administering the law as distinct from the mere justification by the fact that it is law one is administering amounts to a pretension to having some justifying reason for one's judicial commitment, even though one's actually motivating reason were immoral or amoral or a mere unthinking acceptance of a traditional practice".[136]

The judge who adopts the legal point of view regards herself as justified, or at least claims to be justified, in acting on some reasons (legal reasons) to the exclusion of others (non-legal reasons).[137] These legal obligations, however, do not just share a common normative vocabulary with obligations of morality, but also a common point, or set of concerns - the way in which we are to live. Therefore, "whoever purports to exercise legal authority, whether as lawmaker or as judge, has to do so at least upon a colourable claim of doing so reasonably, that is, in accordance with some conception of justice and the public good".[138]

Thus Dworkin's account of adjudication rightly extends to a consideration of the wider question of the relationship between the way judges make their decisions and the nature of the political community to which they belong. The

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[134] MacCormick, "Comment", p.111.

[135] Hart, *Essays on Bentham*, p.265.

[136] MacCormick, "Comment", p.112.

[137] See Raz, *Practical Reason and Norms*, p.144.

[138] MacCormick, "The Separation of Law and Morals", p.120.

commitment to law which the judges make, he argues, is only justified if the legal and political practices of the community satisfy certain conditions which confer authority upon the law and legitimate the community's use of force against its members. Dworkin's theory and the perspective of the judge are therefore gateways into a discussion of authority and legitimacy in the European Union.[139]

1.7 The central case

Clearly, not every individual will conscientiously consider and weigh the relative merits of every possible legal, religious, or moral norm in building up their 'personal normative system', just as not every judge will conscientiously assess the reasonableness of her commitment to the law. However, this truth becomes less important if we consider more carefully our approach to the evaluation and description of law, with the help of Finnis. In drawing this discussion of the committed, normative viewpoint to a close, it is time to introduce an argument made by Finnis which draws together the loose threads in the transition from external viewpoint, to the detached and then to the committed normative viewpoint that has been made during this chapter. As we saw, the external viewpoint presupposed the existence of the normative viewpoints, and within the category of the normative viewpoint, the detached presupposed the committed, which is the 'paradigm' perspective on law. This movement may be said to find its conclusion in Finnis's concept of the 'focal meaning' or 'central case' of the normative point of view.

The 'focal meaning' stands in contradiction to the assumption upon which Kelsen proceeded, that a definition of law should extend to all states of affairs which could be reasonably termed 'law', as the lowest common denominator. Finnis takes the opposite approach: the state of affairs referred to by a theoretical concept in its focal meaning is called by Finnis the *central case*, and the central

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[139] See Chapter Four *infra*.

case is the mature example of those states of affairs as opposed to the underdeveloped, the flourishing rather than the corrupt, the sophisticated not the primitive, the 'fine specimen' rather than the deviant case.[140] However, by what criteria, Finnis asks, "is one meaning to be accounted focal and another secondary, one state of affairs central and another borderline?"[141] We have here returned to the problem posed at the beginning of this chapter, for this question is simply a reformulation of it: from what viewpoint, and relative to what concerns, are *importance* and *significance* to be assessed?

We saw how Hart tries to take what he identifies as the 'internal point of view' of the participant in legal practice, and how Kelsen more successfully adopts the detached, normative viewpoint. Finnis, however, argues that "all this is unstable and unsatisfactory because it involves a refusal to attribute significance to differences that any actor in the field (whether the subversive anarchist or his opponent the 'ideal law-abiding citizen') would count as practically significant".[142] In his view, there is "no good reason for this refusal to differentiate the central from the peripheral cases *of the internal or legal point of view itself*".[143] Kelsen and Raz's anarchistic law professor and Hart's self-interested participant are clearly only watered-down instances of the normative point of view.

For Finnis, the conclusion that we should draw is clear:

> "If there is a point of view in which legal obligation is treated as at least presumptively a moral obligation..., a viewpoint in which the establishment and maintenance of legal as distinct from discretionary or statically customary

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[140] Finnis, *Natural Law and Natural Rights*, pp.10-11.

[141] *Ibid.*, p.11.

[142] *Ibid.*, p.13.

[143] *Ibid.*, p.13 (emphasis in the original). The reference to the 'ideal law-abiding citizen' comes from Raz, *Practical Reason and Norms*, p.148.

order is regarded as a moral ideal if not a compelling demand of justice, then such a viewpoint will constitute the central case of the legal viewpoint".[144]

The central case of the legal viewpoint is therefore that perspective which looks to the presumptive requirements of practical reasonableness, by which Finnis means "reasonableness in deciding, in adopting commitments, in choosing and executing projects, and in general in acting".[145] There is one further qualification to make, however: since some people's views about what practical reasonableness requires will be more reasonable than others', the central case viewpoint "is the viewpoint of those who not only appeal to practical reasonableness but also *are* practically reasonable".[146]

Thus even Dworkin's use of the committed point of view falls short of the central case of the legal viewpoint, as defined by Finnis, since Dworkin's theory draws back from a wholehearted embrace of practical reasoning. Although, Finnis notes, Dworkin is willing "to endow his term or concept, *interpretation*, with much of the richness of practical reasoning's creative engagement with *goods*...and *ends* or *purposes*",[147]

> "[i]nterpretation resists being taken for the whole of practical reasoning; or, perhaps more clearly, practical reasoning - e.g., political *praxis* - resists being rendered as 'interpretation of a practice'. Adjudication and juristic interpretation resist being taken for the constitutive and legislative moments in the life of the law; those moments resist being understood, through and through, as interpretative".[148]

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[144] *Ibid.*, pp.14-15.

[145] *Ibid.*, p.12, and see Ch. V on the "basic requirements of practical reasonableness".

[146] *Ibid.*, p.15.

[147] Finnis, "On Reason and Authority in Law's Empire", p.359 (emphasis in the original).

[148] *Ibid.*, p.363.

In the end, therefore, interpretation shows itself to be more passive and derivative than practical reasoning, which, in reasoning towards choice and action, is active and creative.[149]

Finnis' defence of his 'central case' of viewpoint from which to approach law is persuasive. However, Finnis does not deny the utility of other types of viewpoint, such as that of descriptive social science. There is, he writes, "a movement to and fro between, on the one hand, assessments of human good and of its practical requirements, and on the other hand, explanatory descriptions of the human context in which human well-being is variously realized and variously ruined".[150] This, however, is not to obscure the fact that "the point of reflective equilibrium in descriptive social science is attainable only by one in whom wide knowledge of the data, and penetrating understanding of other men's practical viewpoints and concerns, are allied to a sound judgment about all aspects of genuine human flourishing and authentic practical reasonableness".[151]

The central case does not detract from the fact that the individual (as citizen/subject), the judge, the legal theorist and the sociologist may all have very different practical perspectives, the study of which is precluded by the importance of the central case. The three perspectives identified at the beginning of the chapter are therefore safe, with the caveat that all three must be held up for inspection against the criteria of the central case of the committed, normative point of view. All these points of view will be employed and compared in the following chapters.

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[149] *Ibid.*, p.358.

[150] *Ibid.*, p.17.

[151] *Ibid.*, pp.17-18.

Part Two

System

Chapter Two

The Community

Introduction

Hans Kelsen is not likely to appear on undergraduate reading lists as a post-modernist thinker, yet in this chapter I argue that his concept of a Grundnorm, the norm at the apex of the chain of norms that makes up a legal system, offers a perspective from which all other perspectives become visible. Kelsen's theory offers what can best be described as a postmodern philosophy of European Community law: a theory whose leitmotif is indeterminacy and which easily accommodates the nature of the European Union as a polity which "defies both a readily identifiable textual identity and a readily determinable political determination".[1]

I argue that Kelsen's theory is to be understood as a constructivist theory, which builds a framework of concepts useful only in order to organise what we are

[1] Ward, "Identity and Difference: The European Union and Postmodernism", p.15.

attempting to understand. In contrast to empiricists such as Hart, whose 'rule of recognition' is a sociological construct the existence of which is empirically verifiable against actual behaviour, Kelsen offers a theory which is no more and no less than an 'aid to thinking', to be evaluated only against its usefulness in illuminating actual behaviour. As such, it can expose the indeterminacy at the heart of the Union.

The approach here is to take up the Kelsenian detached normative point of view and consider the European Community as a legal system. (I will explain later why I use the term 'Community' in this chapter rather than 'Union'.) The first section introduces the constructivist approach which is at the basis of Kelsen's theory of law. The second takes a look at the description of the Community as an 'autonomous legal order'. It argues that the question of its effective independence is not determined and suggests that Kelsen's theory of legal system can accommodate this uncertainty and provide a tool with which to comprehend Community law as a system.

2.1 Approaching Community law

Once upon a time the sun rose in the morning and set in the evening. The earth was the centre of all creation, and around it, giving life and sustenance to the creatures upon it, circled the sun. Stars, galaxies, the universe, all that exists to survey and understand, were measured and examined in relation to this focal point: the planet earth.

The sun still 'rises' in the morning and 'sets' in the evening. However, our view of the world has changed; it no longer rests upon the earth as our single, taken for granted, point of reference. We have been able through physics to test our initial model of the universe, find it wanting, and change it accordingly. But the initial, inadequate, model was a necessary starting point, and when we revise it we are improving our theoretical model; what we seek is a 'best' model for making intelligent what we observe. We never observe without some implicit

conceptual model, though at any given time the element of choice of a particular theory is easily overlooked.

We cannot empirically test the nature of the Community legal order. We therefore choose concepts and theories that allow us to impose order upon it, to enable us to understand what we see. However, these choices are often hidden, as are the values on which those choices are made. To debate the concepts of autonomy and sovereignty within Community law is therefore not to discuss facts but to challenge interpretations. The categorical language used to describe Community law tends to obscure the process of theory-building standing behind it, however, and the choices underlying those theories are doubly cloaked. The aim of Kelsen's theory of law is to "unveil its object",[2] and to apply his method to Community law is to turn the spotlight upon these hidden layers in our understanding.

2.1.1 To know and describe Community law

There are many different questions that can be asked about Community law. Is the law in a certain field coherent? How should it develop? Why does it further one policy and not another? In comparison with these the ambition to simply 'know' and 'describe' Community law may appear not only modest but overly narrow:[3] after all, law is a dynamic entity which has far-reaching social, economic, political effects, and we should debate how it ought to be.

However, this is all well and good as long as beliefs about the way Community law should be are not dressed-up as descriptions of the way the Community is. Unfortunately the two projects are often muddled in together, resulting in a critique impoverished and muddied by its foundation upon so many unarticulated descriptive assumptions.

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[2] Kelsen, GTLS, Preface, p.xvi.

The difficulties are multiplied since the way in which one can go about describing law is contestable. However, in the case of the Community one particular approach is the best, and actually visibly (although possibly unconsciously) employed within it. This is the 'constructivist' approach, which is heavily influenced by Kant's work on epistemology.

Roger Cotterrell explains constructivism:

> "Concepts need to be formed in advance - a priori - in order to organise empirical evidence. The previously established concepts not only determine what is empirically relevant but also reflect a view of why it is relevant. The theory aiming at a scientific explanation of any object of knowledge cannot take its concepts from observed experience but must deliberately construct concepts as a means of interpreting experience, of imposing order on it".[4]

Every attempt to 'know', every science, must therefore create its own conceptual apparatus.

European Community law can therefore be 'known' by constructing a framework of concepts, a theory, to allow us to organise what we observe into an intelligible structure. This is exactly what has happened in Community law: concepts such as 'legal order', 'constitution', 'supremacy', 'sovereignty', 'competence', and many others, have been employed by those engaged in the Community to give a coherent account of the law. Yet as Cotterrell noted above, these previously established concepts do not only determine what is empirically relevant but reflect a view of why it is relevant.

Our choice of concepts and thus our choice of theory becomes crucial. This is because these concepts and theories do not exist in a vacuum. A theory is a tool

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[3] To 'know' and 'describe' law are given by Kelsen to be the exclusive purpose of his theory of law: PTL, p.1.

[4] Roger Cotterrell, *The Politics of Jurisprudence* p.86. Cotterrell terms this approach 'conceptualism', but 'constructivism' has been preferred here.

which is available to be used for good or ill just as any other tool. Yet it is not in the nature of the tool itself to determine the use to which it will be put.

For example, the concept of a legal order was used early on by the Court of Justice. In the often-quoted words of the Court in the *Van Gend en Loos* case, "the EC Treaty has created its own legal system...The Treaties are not just international agreements".[5] To characterise Community law as an order of law not only determines the importance of the unifying and systemic elements within it but also emphasises the view that Community law is to be distinguished as an independent whole, as opposed, for example, to an understanding which equates it with international law.

The importance of our choice of concepts and the separation of the concept from the decision to adopt it is reflected in another characteristic of constructivism: its constitutive nature. The constructivist approach does not only describe the law but also has a constitutive character - "it 'creates' its object insofar as it comprehends the object as a meaningful whole".[6] Without theory there is no European Community law, because it is theory that gives us concepts such as 'obligation', 'duty', 'validity', which we must have in order to know what 'law', and 'Community law' is.[7]

To know and describe Community law then it is necessary to take two different angles, and employ both a constructive and deconstructive approach. Since claims already exist regarding the nature of 'Community law', one task is to strip away those claims to their conceptual bones, and, further, cleave those concepts from the actual decision (articulated or not) to adopt them. The

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[5] Case 26/62, [1963] ECR 1, at *12*.

[6] PTL, p.72.

[7] To say that theory 'creates' its object is not to say that it creates law in the way that law is created by a legal authority. This 'creation' has a purely epistemological character. See PTL, p.72.

second task is to evaluate the concepts that have been adopted and to ask if others may be more appropriate.

2.1.2 Evaluating the concepts

A theory or description of Community law based on constructivism makes no claim to be derived from or to reflect actual practice or empirical 'reality' in the Community. Kelsen nowhere suggests that his general theory of law can be tested in the light of experience. The correctness of his theory is to be evaluated only according to its usefulness in organising and illuminating what we know about Community law.

It is another type of theory that is to be evaluated according to the accuracy of its portrait of observable reality - a theory which stands in contradistinction to the constructivist. 'Empiricism' is the name given by Cotterrell to the idea that theory is:

> "a direct representation of empirical reality, with its concepts derived from observation of and generalisation about that reality and so corresponding with it and testable for truth against it".[8]

This is the approach to theory adopted by Hart, whose 'model of rules' has been variously invoked as the foundation for a theoretical understanding of EC law.[9]

However, Hart's empiricism is problematic in the context of the European Community. At the birth and during the first years of a new legal order, there is not the luxury of time to develop a theoretical framework "by examining an institutional reality represented by this legal order".[10] In fact, there is no

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[8] Cotterrell, *The Politics of Jurisprudence.*, p.85.

[9] See MacCormick, "Beyond the Sovereign State", and Jones, "The Legal Nature of the European Community: A Jurisprudential Model Using H.L.A. Hart's Model of Law and Legal System".

[10] Bengoetxea, "Institutions, Legal Theory and EC Law", p.201.

'institutional reality', only the reality created by our choice of the framework of concepts we assemble in order to interpret this new entity. In the EC this is demonstrated by the use, in the debate regarding the nature of the Community, of concepts transposed from another age, including that of a legal system.

The concept of a legal system implies a coherence and unity unfamiliar to the 'empirical reality' of Community law. Yet it is in these terms that Community law is described by the Court of Justice. However, concepts cannot stand alone; the concept of a legal system is meaningless without an accompanying theory of system, of legality, of a law, and so on. In Kelsen's theory concepts such as that of a legal system are given their place in this supporting web and provide a coherent and extensive theory against which to test the utility of the claims and concepts made and used in Community law.

2.1.3 The law of the Community or the law of the Union?

I have begun this chapter using the label 'Community' rather than 'Union' legal order. This needs some justification: we are no longer subject to the authority of a European Community but to that of a Union. I must address a question that immediately arises: which law is the object of my inquiry? The law of the European Community or the law of the European Union?

In 1993 the 'European Communities' were replaced by the 'European Union'. The structure resulting from Maastricht has been described as a temple resting upon three pillars. The first pillar is the European Community (based on the three original European Communities); the second is the Common Foreign and Security Policy (CFSP); the third Cooperation in the fields of Justice and Home Affairs (CJHA). Curtin, in 1993, refers to this arrangement as being less architecturally stable than might appear: she describes the connection between

the pillars as a "loose, tarpaulin-like structure...suspended artificially and tenuously above both the loose pillars and the Community as such".[11]

Writing several years later, in 1999, Curtin (with Dekker) notes that European legal circles have stubbornly resisted the idea that the European Union constitutes a new entity that exists above and beyond the European Communities. She argues that many legal books still refer to European Community law, and that the CFSP and CJHA are treated as residual subjects.[12] She claims that "a majority of scholars who specialize in European law recognize the existence of the European Union as an international organization or entity *sui generis* existing side by side with the European Communities, but deny its unitary structure".[13] The legal system of the European Community, as the first pillar, is thus viewed as independent from the other Union pillars. The Community is seen as a supranational entity, while the other Union pillars are intergovernmental.

Curtin and Dekker document different views on the question: some authors deny the existence of the European Union as a subject of international law at all; others argue that the EU has grown into an international legal entity with a single legal system that knits together the three pillars.[14] They themselves defend the thesis that the Treaty on European Union and the evolving legal practices since 1993 "indicate that the legal system of the European Union as such is developing as an institutional unity".[15] This conclusion is, however, qualified: "this unitary institutional legal system creates spaces for developing a variety of sub-legal systems, not only within the Union itself but also within the three

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[11] Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", p.23.

[12] Curtin and Dekker, "The EU as a 'Layered' International Organization: Institutional Unity in Disguise", p.83.

[13] Curtin and Dekker, *op. cit.*, pp.83-4.

[14] See Curtin and Dekker, *op. cit.*, pp.84-5.

[15] Curtin and Dekker, *op. cit.* p.86.

'pillars'".[16] The institutional legal system of the EU is therefore 'unitary' but also 'complex'.

It is clear from Curtin and Dekker's writing that there is no clear legal picture of the European Union and no consensus of opinion. The Treaty of Amsterdam has blurred the line between the Community pillar and the rest of the Union even further by, for example, giving the Court of Justice jurisdiction over matters falling within the third pillar. To constrict oneself to an analysis only of the European Community seems myopic and inaccurate, yet it is also clear that the European Community can be distinguished from the other elements of the Union. I have in the end used the label 'Community' in this chapter, and the label 'Union' in the subsequent chapters on authority and legitimacy. I have done this for clarity's sake, and also because, as Curtin notes, the 'tradition' amongst the writers of legal textbooks is to adopt this distinction between the Community and Union.

It will become clear, however, that the Kelsenian model of legal system I discuss in this chapter and Chapter Three does not confine law within a particular boundary, whether state, community or organisation. Laws are defined as such according to their relationship with other laws: ultimately, the distinction between the laws of the Community and the laws of the Union has only organisational value. Therefore while I use the term 'the Community legal system', since the majority of Union norms are to be found under the label of the Community pillar, this includes norms that may fall under the other pillars of the Union (and, in fact, within the systems of the Member States). In this, narrowly normative, sense (not to be confused with the organisational sense), I agree with the thesis that the Union and Community are essentially one system.

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[16] *Ibid.*

2.2 Community law: an 'autonomous legal order'?

The Court of Justice views Community law as forming "an autonomous legal order".[17] Yet "the very notion of order is an interpretative notion":[18] on what basis is this interpretation of Community law given? In Kelsen's work can be found two possible approaches with which to analyse the Community's claim to autonomy. One focuses on the formal structure of the Community, attempting to place it among the categories of unitary State, federation, confederation and so on. The other is to use Kelsen's theory of legal system.

2.2.1 The formal character of the Community as an international structure

Under the rule of general international law that treaties should be obeyed, bodies of 'particular' international law may be created. The Community was set up by international treaties and could be viewed as a body of particular international law. Kelsen lists several such bodies, which he describes as "communities not having the character of states",[19] which may be communities of individuals (such as the Roman Catholic Church), or communities of states (confederations, such as the United Nations).

Kelsen's view is that "every treaty concluded by two or more states constitutes an international community",[20] although he is careful to distinguish between the nature of the community formed by a treaty establishing a confederation and the community formed by a treaty establishing a federal state.[21] The first is an international, the second a national community. Although both are set up by

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[17] Case 26/62, *Van Gend en Loos*, [1963] ECR 1.

[18] Bengoetxea, "Institutions, Legal Theory and EC Law", p.203.

[19] PIL, p.251.

[20] PIL, p.262.

[21] PIL, p.262ff.

means of a treaty, the treaty of the federation stipulates the constitution of the new community, and thus the "community has the character of a state, and the constitution the character of national law".[22]

The test for the transformation of a community set up under international law which takes on the character of a state, with its accompanying independent claim to validity, is the degree of the community's centralization. A federal state "presents a degree of centralization that is still compatible with a legal community constituted by national law, that is, with a state, and a degree of centralization that is no longer compatible with an international legal community, a community constituted by international law".[23]

A confederation can thus be identified from three typical characteristics. Firstly, its members, as opposed to the central organ or organs, have unrestricted competence in foreign affairs (although they may have certain obligations under the constituent treaty). Secondly, there is little centralisation of executive power, particularly military power. A confederation will not have its own police or armed forces. This entails that war and sanctions are or would be waged and executed using the resources of the member states. Thirdly, the central norms of the legal order affect only states; individuals are affected only indirectly, through their own national legal order.

Is the European Community an international community or a community such as a federal state, which has the character of a state? Robert W. Tucker, revising and editing Kelsen's 1952 work *Principles of International Law*, argues that it is a part of international law, a confederation. Writing in 1966, he rejects the view that the treaties constituting the European Communities have resulted in a

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[22] PIL, p.260.

[23] PIL, p.262. A legal community may, for example, be *validated* but not *constituted* by international law. See below for a discussion of the possibility that a State legal order is validated by international law. However, such an order is not *constituted* by international law, since it has a prima facie claim to autonomy and validity that renders it independent from the international legal order.

federation, or partial federation. Although he describes the Communities as having reached "an unusual degree of centralization over certain functions traditionally within the domestic jurisdiction of states",[24] in his view that level of centralization is not that of "even a partial federation, let alone a federation".[25]

Tucker gives a number of grounds for his view. He accepts that the norms of the Communities do impose obligations directly upon individuals, and that the third characteristic of a confederation is, in this case, closer to that of a federation. However, he lists four aspects of the High Authority which demonstrate to him the confederal nature of the Communities. Firstly, the High Authority has no powers of enforcement. Secondly, it has no competence to execute sanctions. Thirdly, the Communities have no police or military forces. Lastly, and "perhaps most important", the treaties place no substantial limitation on the contracting parties' competence in foreign affairs, other than certain limitations on economic relations resulting from specific obligations of the treaties. The Member States thus retain full international personality.

In the well-known *Van Gend en Loos*[26] case of 1962 the Court of Justice emphasises the breaking away of the Community from the Member States, but seems to offer an endorsement of Tucker's view. The Court follows the arguments of the Commission that the Treaty establishes a legal system, not merely mutual commitments between states.[27] It concludes that "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their

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[24] PIL, p.264, footnote 89.

[25] PIL, p.265, footnote 89.

[26] Case 26/62, [1963] ECR 1.

[27] Arguments and observations of the Commission, at p.7.

nationals".[28] This language fits precisely with Tucker's 'Kelsenian' analysis of the European Communities. Although the direct effect of Community norms pushes the Community along the spectrum towards the category of centralised federation, it is still a part of international law: the Community may be a new legal order but nevertheless remains a legal order of *international* law.

Today, however, the Court refers no longer to a 'legal order of international law' but simply to a 'new legal order'.[29] So is Tucker's 'Kelsenian' characterisation of the Communities still valid today? Briefly, the Community does have powers of enforcement: under Article 226 of the EC Treaty, the Commission can bring proceedings against a defaulting state in the European Court. The Community also has power to execute sanctions, under Article 228 of the EC Treaty. With regard to the Member States' competences in foreign affairs, the Community has enlarged its own competence to the extent that "[the] Court of Justice can prevent [the Member States] from accepting particular rules in an international agreement".[30]

However, even with the developments in the Community, it still has no police force or army of its own - a lack which Tucker, following Kelsen, considers definitive as excluding the possibility that a community could be constituted by anything other than international law. He reiterates that "while the degree of centralization is decisive in determining whether a community of states constitutes a federal state, this centralization must comprise the competence formerly possessed by the component states in foreign and military affairs".[31]

Yet although the formal degree of centralization of the EC is that of a confederation, the Community is alleged to have its own constitution and the

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[28] At p.12.

[29] See, e.g., *Re the Draft Treaty on a European Economic Area*, Opinion 1/91 (First EEA Case), [1991] ECR 6079, para. 21 of the judgment.

[30] Schermers, "Commentary on Opinions 1/91 and 1/92", p.1004.

[31] PIL, p.265, footnote 89.

internal claim to validity which, for Kelsen, corresponds only to a nation state. It is this incongruity which suggests that Kelsen's spectrum of legal communities may have to open up to accommodate a new category: a community which is not constituted by international law but that is not a federation. However, we are jumping ahead: it is *alleged* that the Community is an independent legal order, but is this so in terms of Kelsen's theory? Kelsen's theory of legal system offers a new tack with which to approach this question.

2.2.2 Community law: a legal system?

Any concept of a legal order must rest on a theory of its constituent parts and of the order-creating relationship between them. Kelsen describes a legal order as a system of norms which regulate human behaviour through the medium of 'coercive acts' (sanctions).[32] From this description can be teased out three strands in Kelsen's theory of a legal order: the concept of a norm, of a system (the unifying relationship between the norms), and of a sanction.

2.2.2.1 Bypassing 'norm' and 'sanction'

I want to focus particularly on the second strand, the nature of a system, but first I must acknowledge the controversy surrounding both the concept of 'norm' and 'sanction' as found in Kelsen's work. The European Community lawyer will most probably wish to denounce any suggestion that Community law is to be equated with 'norm', which smacks of a bygone (possibly imaginary) era in which law was a clear-cut, rigid set of rules. How can the general principles of Community law, its underlying values, the 'ethical core' of EC law, be accommodated within the concept of a norm?

This question deserves a far more detailed response than that which can be offered here, but I would like to quickly turn it on its head before moving on. Legal systems may contain principles, values, or 'ethical cores', but they are

[32] PTL, pp. 30-31.

"governed by juridical norms".[33] Any theory which aims particularly to focus on the principled, value-orientated side to law must also provide for the obligatory, normative character of law.

Dowrick, in his consideration of Kelsen's and Hart's models of law as applied to the European Communities, rejects them on the basis that they ignore the presence of principles. Dowrick prefers Ronald Dworkin's rights-based theory which, of course, is built up around a critique of Hart's concept of law.[34] The existence of the values and principles in European Community law is obviously an important part of the Community order, and Ronald Dworkin's theory has also been cited elsewhere as providing the basis for a rights-based, Kantian theory of Community law.[35]

It may be that on a constructivist evaluation Dworkin's theory does provide a more illuminating tool with which to understand Community law. However, one might object that Dworkin's theory does not so much subvert as presuppose central elements in positivistic analyses of law, of which Kelsen's is one. Neil MacCormick argues that Dworkin's reliance on "constitutive and regulative rules"[36] to define a legislature "takes us right back either to Kelsen's conception of norms of competence...or Hart's conception of primary rules...".[37] Therefore, there is a question mark over Kelsen's concept of a norm, but it cannot be dismissed *a priori*.

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[33] Ward, "Making Sense of Integration: A Philosophy of Law for the European Community", p.132.

[34] Dowrick, "A Model of the European Communities' Legal System".

[35] Coppel and O'Neill, "The European Court of Justice: Taking Rights Seriously?"; Ward, "Making Sense of Integration: A Philosophy of Law for the European Community".

[36] Ronald Dworkin, *Taking Rights Seriously*, p. 101, quoted in MacCormick, "Jurisprudence and the Constitution", p.23.

[37] If, as Dworkin's theory requires, we must refer to a set of institutions in order to "filter out of background morality a set of principles which 'fit' the said institutions..., then it follows that some procedure must exist for identifying the institutions independently of either

2.2.2.2 Law as system: the chain of validity

The norms of which a legal system consists are described by the statement "something ought to be", as opposed to "something is".[38] A norm is not just a subjective command but has an objective meaning which, since an 'ought' cannot be derived from an 'is', can only be conferred upon it by another, higher, norm;[39] the higher norm confers validity upon the lower. It is this conferral of validity that relates and unifies all the norms of a particular legal system.

The problem of the identification of a norm cannot be separated out from the identification of the body of norms to which it belongs. For example, a norm may be valid because it has been issued by a legislator. However, that legislator must be a *competent* legislator, and that competence is only conferred by a valid norm. Therefore there is a 'chain of validity':[40] the reason for the validity of any norm is a 'higher' norm, which in turn is validated by a higher norm, and so on. However, the search for validity does not go on indefinitely. It ends with a norm which is the highest norm, the 'basic norm'.[41] A plurality of norms thus forms a unity, a system, if the validity of the norms can be traced back to a single norm as the ultimate basis of validity.

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background morality or *a fortiori* institutional morality"; see MacCormick, "Jurisprudence and the Constitution", p.24.

[38] The statement "something ought to be" describes a norm while the statement "something is" describes an existent fact (PTL pp.5-6).

[39] Only in this way can the command of a gangster be distinguished from the command of a tax-man.

[40] The term 'chain of validity' is not used by Kelsen but I have adopted it from Raz, *The Concept of a Legal System*. It is also used by Paulson in his translation of the first edition of *Reine Rechtslehre*, IPLT.

[41] PTL, p.8.

Normative relations in Community law

A theory of legal system as including a hierarchy of norms is to be found deeply embedded in the life of the Community, from standard textbooks on Community law,[42] to the European Court of Justice and the founding Treaties. The 'chain of validity' refers back to the dynamic nature of a legal order,[43] meaning that the validity of its norms is dependent solely on the act of creation, and this is mirrored in the Court's understanding of Community law as organised as a "system of sources".[44]

However it must be emphasised here that the chain of validity between the norms of a legal system is not to be equated with a schematic representation of a legal system arranged into a hierarchy of types of sources. Confusion on this score is all too easy, as is shown by the language used in the debate regarding a hierarchical schema for the Community legal order. Proposals for the introduction of a "hierarchy of legal acts"[45] stood alongside proposals for a "hierarchy of norms".[46] However, as Joseph Raz puts it, "a law is not identical with a statute";[47] similarly, a norm is not identical with a regulation.

Kelsen sets out the structure of a national legal order, listing the constitution, legislation, custom and so on as different levels of hierarchy.[48] However this is not a blueprint for a legal order, as shown by his discussion of the case of the

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[42] See, for example, Hartley, *The Foundations of European Community Law,* Ch.4.

[43] Kelsen draws a distinction between a dynamic and a static legal order. In the latter, validity is dependent on content, in the former, on creation. See PTL pp.195-198.

[44] *Variola* v *Amministrazione italiana delle Finanze,* Case 34/73 [1973] ECR 981, paragraph 8 of the judgment.

[45] Draft amendment to the EEC Treaty, proposed by the European Parliament, 18 April 1991, OJ C129, 20.5.91, p.136, at p.138.

[46] Draft amendment to the EEC Treaty, proposed by the Commission, EC Supplement 2/91 p.117, at p.121.

[47] Raz, *The Concept of a Legal System,* p.71.

[48] PTL, p.221.

United Kingdom, which would not fit his schema.[49] Whereas the hierarchical chain of validity linking norms is an essential criterion for the existence of a legal system, the hierarchical organisation of sources of law is merely one possible characteristic of a legal system.

This point is not appreciated by Dowrick, who concludes that since the European Communities' legal sources do not fit the plan suggested by Kelsen, there is no hierarchy between Community law norms. It is arguable whether the Community legal order can be organised hierarchically in terms of its sources,[50] but even if it cannot, as the most extensive study concludes,[51] Kelsen's criteria for the existence of a legal system remain unaffected.

The view that the validity of a norm of Community law is ascribed and delimited by a higher norm is in fact enshrined in the Treaties and seen clearly in cases in which the question of legality is raised. Direct challenges to Community acts, for example, can be made under Article 230 of the EC Treaty, which provides four grounds of review: (i) lack of competence; (ii) infringement of an essential procedural requirement; (iii) infringement of the Treaty or any rule of law relating to its application; and (iv) misuse of powers. Cases citing Article 230 (Article 173 before the TA amendments) are explicitly brought together under the heading 'legal basis', and indeed "every legislative measure adopted by the Community institutions should have a legal foundation in a Treaty provision, or in an earlier legislative measure itself based upon a Treaty provision".[52]

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[49] GTLS, p.124.

[50] Lasok and Bridge, *Law and Institutions of the European Communities.*

[51] Gerd Winter (ed.), *Sources and Categories of European Union Law: A Comparative and Reform Perspective.*

[52] Bradley, "The European Court and the Legal Basis of Community Legislation", p.379. Article 253 of the EC Treaty provides that legislation must state the reasons upon which it is based.

Thus all challenges regarding the validity of Community acts regress back to the Treaty, to compatibility with its norms. In fact, all four grounds of review may be reduced to the third, given a wide enough interpretation: the norms of EC law are valid if their claim to validity can be traced back to 'higher' norms - norms of the Treaty or, as Article 230 says, "any rule of law relating to its application". Clearly the institutions of the Community view the validity of EC norms in a way consistent with Kelsen's theory, ascribing validity only if the norm has been created in accordance with another, higher norm.

How far does this view square with Kelsen's understanding of the chain of validity? He traces a norm of national law back to its root in the basic norm.[53] He takes as an example the hanging of one man by another. This is a legal act if it is undertaken in response to a judicial decision which prescribes the execution of such a punishment. Why is the judicial decision valid? Because it is an application of a criminal law containing norms under which the death penalty may be inflicted under certain conditions. This criminal law may have been created by a legislature, which is authorised by norms in the national constitution to create such general norms.

If we ask from whence is derived the validity of the constitution, we arrive at the historically first constitution, which contains norms which do not derive their validity from any other norms; it will have been created in a 'revolutionary' way, either by a breach of a former constitution, or in the sense that it is applicable to territory formerly not under the sphere of validity of a constitution. This is the point at which a binding norm must be presupposed as conferring validity upon the norms of the constitution, and this norm will be the Grundnorm.

In the same way, a norm of Community law can be traced back to its origins. As a starting point we may take the decision of the Commission in 1991 in

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[53] PTL, pp.199-201.

which it refused to allow the take-over of DeHavilland by Aerospatiale and Alemia.[54] The decision contains a legal norm which forbids the take-over. This decision is legally valid because it is an application of a regulation under which the Commission can block take-overs given certain conditions.[55] The regulation was issued by the Council, which is authorised by the Treaties to create such general norms.[56]

The chain of validity becomes more difficult to trace once the validity of the EC Treaty itself is questioned. It must first be clarified that the EC Treaty, as a "certain solemn document",[57] would fall within Kelsen's category of formal constitution.[58] In terms of the hierarchical structure of the legal order, however, the constitution must be understood in the material sense, that is, as "the positive norm or norms which regulate the creation of general legal norms".[59] Whereas in most States the formal constitution will contain the mass of the norms of the material constitution, the norms of the material constitution of the Community are particularly diffuse and spread between the various Community Treaties, Conventions and even decisions of the Council.[60]

To ask why the norms of the material constitution are valid is to arrive at the apex of the chain of validity. At this point there are three possible sources of the authority of the norms of Community law. They may be valid: (i) because of a

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[54] See (IV/M53) OJ 1991 L334/42.

[55] Regulation 4064/89/EEC (Merger Control Regulation, OJ 1989 L395), under Article 2 of the EC Treaty.

[56] Article 249 of the EC Treaty.

[57] GTLS, p.124.

[58] PTL, p.222.

[59] PTL, p.222.

[60] For example, the Decision to Replace Financial Contributions from Member States by the Communities' Own Resources, 21 April 1970, and the Decision on Direct Elections to the European Parliament, 20 September 1976, which, Dowrick notes ("A Model of the European Communities' Legal System", p.181), rank with general provisions of the basic Treaties as major constitutional provisions.

norm of international law, in which case Community law is a part of international law; or (ii) because of a norm of a Member State legal system, in which case Community law is a part of that legal order; or (iii) because a Grundnorm may be presupposed in relation to the Community legal order which gives it an internal claim to validity.

2.2.2.3 A Grundnorm of Community law? Nine hypotheses

The chain of validity of the norms of a legal system ends at the point at which it reaches a norm which seems not to derive its validity from any other norm. It is the Grundnorm, or basic norm, which confers validity upon this norm. In a national legal order, for example, the validity of the constitution may rest on an historically older constitution. Eventually we reach the historically first constitution, which contains norms that do not derive their validity from any other norms.

There are different ways in which we can interpret these norms. They could be viewed as normative because they are in accordance with some ethical, religious, or otherwise meta-legal norm. Or alternatively, they may not be interpreted normatively at all: 'law' could be viewed as structuring a series of power relationships - in other words, it could be interpreted sociologically, not juristically.[61] However, the concept of the basic norm allows natural law to be rejected as the basis of positive law while still understanding the positive law as "a valid system, that is, as norm, and not merely as factual contingencies of motivation".[62] In order to interpret law normatively without reference to meta-legal authorities, the basic norm that "one ought to behave as the constitution prescribes"[63] is presupposed.[64]

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[61] PTL, p.218.

[62] IPLT, p.58; PTL p.202, p.218.

[63] The basic norm in the case of a national legal order may be formulated as follows: "Coercive acts sought to be performed under the conditions and in the manner which the

The concept of the basic norm is an epistemological tool only: it may but need not be presupposed. It is a cognitive, not normative, concept; Kelsen's theory nowhere prescribes that the Grundnorm ought to be obeyed. Kelsen merely notes that it is presupposed: "the basic norm makes conscious what most legal scientists do, at least unconsciously, when they...consider as law exclusively positive law",[65] accepting a normative legal order "without basing the validity of this order upon a higher, meta-legal norm, that is, upon a norm enacted by an authority superior to the legal authority".[66]

The basic norm is presupposed when the custom through which the constitution has come into existence, or the constitution-creating act, is interpreted objectively as a norm-creating fact. In this sense, "the basic norm determines the basic fact of law creation and may in this respect be described as the constitution in a logical sense of the word".[67] If the Community's legal order, then, is autonomous, a basic norm is presupposed in relation to its material constitution, validating Community law not as a part of international law, or Member State law, but in its own right.

However, there are two complications to the alternative ways in which the law of the Community may be interpreted normatively. Firstly, it is perfectly possible to argue that the Community was once part of international law, for example, but now is an independent legal order. This is so because the Grundnorm can change, as highlighted by the case in which the existence (and the validity) of an entire legal order is in question. This occurs in the case of a revolution, which in its broader sense refers to every case in which "the valid

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historically first constitution, and the norms created according to it, prescribe. (In short: One ought to behave as the constitution prescribes.)" (PTL p.201).

[64] PTL, p.202

[65] PTL, p.205.

[66] PTL, p.205.

[67] PTL, p.199.

constitution is changed or replaced in a manner not prescribed by the constitution valid until then".[68] A large part of the law of the original constitution may be said to 'remain valid', but in fact this is misleading. The content of these laws remains, but the reason for their validity, in fact the reason for the validity of the whole legal order, has been changed.[69] The basic norm no longer is presupposed in relation to the old constitution but instead to the new: it is through the new constitution that the norms of the legal system are validated.

Secondly, Kelsen distinguishes the highest norms of a legal system as either being contained in a written or unwritten constitution. As such, there can be two kinds of Grundnorm: firstly that which validates the constitution promulgated by the 'founding fathers' and secondly that which validates the norm-creating effect of custom within the legal order.[70]

Even if the Treaties were equivalent to a written constitution for the Community, Kelsen notes that even a written constitution may not be the constitution in the 'material' sense (which comprises all the highest sources authorised by the Grundnorm) if it does not stipulate custom as a source of law.[71] Since custom is a source of Community law but is not specified as such in the Treaties, the Community would be placed into the category of 'customary constitution'. This distinction, however, means simply that the chain of validity moves from the Grundnorm, to custom, to the Treaties (referring to the material constitution contained within them). If custom were to be expressly stipulated as a source of Community law, the places of custom and the Treaties would simply be reversed.

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[68] PTL, p.209.

[69] PTL, p.209.

[70] PTL, p.223.

[71] GTLS, p.126; PTL, p.221-224.

Therefore, not separating out the two different types of basic norm, there are nine possible hypotheses regarding the validation and the authority of Community law:

H1: The Community legal order is and always has been validated by a basic norm presupposed in relation to it.

H2: The Community legal order was initially validated by its basic norm; a 'revolution' has taken place, and now Community law is validated by a norm of international law.

H3: The Community legal order was initially validated by its basic norm; a 'revolution' has taken place, and now Community law is validated by a norm of a Member State legal order.

H4: The Community legal order is and always has been validated by a norm of international law.

H5: The Community legal order was initially validated by a norm of international law; a 'revolution' has taken place, and now Community law is validated by a basic norm presupposed in relation to it.

H6: The Community legal order was initially validated by a norm of international law; a 'revolution' has taken place, and now Community law is validated by a norm of a Member State legal order.

H7: The Community legal order is and always has been validated by a norm of a Member State legal order.

H8: The Community legal order was initially validated by a norm of a Member State legal order; a 'revolution' has taken place, and now Community law is validated by a basic norm presupposed in relation to it.

H9: The Community legal order was initially validated by a norm of a Member State legal order; a 'revolution' has taken place, and now Community law is validated by a norm of international law.

These nine hypotheses could be said to underlie - or at least be compatible with - the various judgments regarding the juridical nature of the Community legal order.

Model 1: EC law as part of the law of the Member States (hypotheses 3, 6 and 7)

The case for the first model, EC law as part of the law of the Member States, stems from the origin of the Community as a creation of states. Under this model, a Member State has power to make international agreements and create new norm-creating bodies outside itself; the norms issued under those agreements and by those bodies remain part of that state's law. In each Member State, therefore, Community law is understood as part of its own legal system.

It is clear that the perspective of the Court of Justice is strongly against this model of the Community. In *Costa* v *ENEL*[72] the emphasis of the judgment is to clarify the independence of the Community from the legal orders of the Member States. It first asserts that the EEC Treaty, "by contrast with ordinary international treaties", has created "its *own* legal system".[73] The Court then explicitly describes the law stemming from the Treaty as an "independent source of law", which cannot be "overridden by domestic legal provisions...without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".[74] The Court thus declares the autonomy of the Community legal order as

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[72] Case 6/64, [1964] ECR 585.

[73] At p.593.

[74] At p.594.

compared with the internal legal orders of the Member States early on in the life of the Community.

As Neil MacCormick puts it, the perspective of the judges of the Court of Justice "on the law they administer is, and perhaps necessarily, that of a single legal system with a single and common ground of validity. They do not conceptualise Community law as a set of commonly agreed norms that belong strictly to as many legal systems as there are Member States..., having no special systemic validity of their own".[75] Effectively, the Community system does not accept its foundation upon a norm of a Member State.

The hypothesis that Community law has at any time formed part of Member State law (which would, by excluding international law, mean one *single* Member State) certainly does not reflect Community practice up to now. The flip side of this model would be Schilling's claim that "the Member States, individually, must have the final word on questions concerning the scope of the competences they have delegated to the Community".[76] As Weiler and Haltern point out, however, this would be a "pragmatic nightmare" and in fact "the High Contracting Parties established such elaborate provisions for centralized judicial review in order to, among other reasons, escape the pragmatic nightmare...".[77]

Whatever the arguments for and against adopting this hypothesis, it is clear that although it raises its head in particular, one might say peculiar, cases,[78] it would be misleading in the extreme to say that it gives the most useful tool with which

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[75] MacCormick, "Liberalism, Nationalism, and the Post-Sovereign State", p.148.

[76] Schilling, "The Autonomy of the Community Legal Order - An Analysis of Possible Foundations", p.407.

[77] Weiler and Haltern, "The Autonomy of the Community Legal Order - Through the Looking Glass", p.433.

[78] See, for example, the *Brunner* decision: Judgment of Oct. 12, 1993, BverfG, 89 BVerfGE 155 (*Brunner* v *Treaty on European Union*); English translation [1994] 1 CMLR 57-108.

to describe the workings of Community law. Particularly by ignoring the Member States' use of international law, it misleads rather than illuminates.

Model 2: EC law as part of international law (hypotheses 2, 4, and 9)

Given the strength of claims that "[a]t least at its inception, the European Community was a creature of international law",[79] H4 is to be preferred over H4 and H9. As part of the system of international law, the authority of Community law would rest upon the norm of international law which provides that treaties contain legally binding norms: the norm *pacta sunt servanda*. The Community would therefore be a community of international law, what Kelsen terms 'particular international law', like communities such as the United Nations, and would be subject to the same rules of amendment and interpretation.

However, the Court of Justice has consistently held that the Treaties are not mere international agreements[80] and will not be interpreted as if they were.[81] Development of the doctrines of direct effect and supremacy of Community law are referred to as the hallmarks of the so-called 'process of constitutionalization' of the Treaties. In Easson's words, "[w]hat are in their initial conception multipartite treaties have been transformed into constitutional documents".[82]

The constitutionalization debate is, in terms of the nine hypotheses, the debate between H4, that the Community is and always has been validated by a norm of international law, and H5, that the Community legal order was initially

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[79] Schilling, *op. cit.*, p.403.

[80] E.g. *Van Gend*, Case 26/62, [1963] ECR 1; *Costa* v *ENEL*, Case 6/64, [1964] ECR 585.

[81] See, e.g., *Polydor*, Case 270/80, [1982] ECR 329.

[82] Easson, "Legal Approaches to European Integration: The Role of the Court and Legislator in the Completion of the European Common Market", p.103.

validated by a norm of international law; a 'revolution' has taken place, and now Community law is validated by a basic norm presupposed in relation to it. The arguments will be considered in more detail below, but it suffices to say at this point that the only conclusion can be that the question is open to debate. One author considers the Treaties to be a constitution, another that they remain international treaties.

The indeterminacy is such that even the same 'speaker' can change opinion. Schilling cites the German Federal Constitutional Court (the Bundesverfassungsgericht) as "[balking] at the claim of the ECJ that the European Treaties are the constitution of an autonomous legal order",[83] yet the same court twenty years earlier describes the Community legal order as "an independent system of law flowing from an autonomous legal source".[84] It is uncertain whether the Community remains based upon a norm of international law, or whether there has been an effective change to the highest norms of the system rendering the Community autonomous.

According to Schilling, his conclusion, that international law is still the basis of the Community order, is "based upon the Kelsenian approach".[85] Entirely contrary to this is the thrust of this thesis, which argues that Kelsen's theory demands no leaps into one camp or the other. In fact, it is suggested below that a 'Kelsenian approach' offers a way to *accommodate* the state of indeterminacy that is to be found regarding the "is" or "is not" question of the Community's autonomy.

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[83] Schilling, "The Autonomy of the Community Legal Order - An Analysis of Possible Foundations", p.397, referring to *Brunner.*

[84] *Internationale Handelsgesellschaft* v *EVGF*, decision of the Bundesverfassungsgericht, 29 May 1974, [1974] 2 CMLR at 549, para. 19 of the judgment.

[85] Schilling, *op. cit.*, p.398.

Model 3: Community law as an independent system (hypotheses 1, 5 and 8)

Although the debate has focused most sharply on the 'constitutionalization' process within the Community, which argument matches the fifth hypothesis (H5), there is also support for the view that the Community is and always has been an autonomous legal order; that it is and always has been validated by a basic norm presupposed in relation to it. Joxerramon Bengoetxea, for example, describes the Treaties as "performative-constitutive speech acts which institute their own authority by the mere formal act by which they come into being".[86]

However, to characterise the Community legal system as enjoying, in Schilling's words, an 'original constituent autonomy',[87] obscures the early interpretation and effective nature of the Treaties as no more than international agreements and not a constitution.[88] The Community may have had characteristics unusual to a community of international law but its original internationalism is evident in the attitude both of the Community institutions themselves and of the Member States.

The question of the autonomy of the legal order is focused upon H5, that the Community legal order was initially validated by a norm of international law; a 'revolution' has taken place, and now Community law is validated by a basic norm presupposed in relation to it. As noted above, the basic norm can change if the legal order of a community is changed in a way not anticipated or prescribed by the first order itself. To show that the basis of the authority of the Community order has changed and that a basic norm is now presupposed in relation to it, it is therefore necessary to demonstrate that three limbs of this test

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[86] Bengoetxea, "Institutions, Legal Theory and EC Law", p.207.

[87] Schilling, *op. cit.*, pp.390-395.

[88] E.g. Pescatore notes two occasions on which the Treaties were amended through international law as opposed to the procedures prescribed within them: Pescatore, *L'ordre juridique des Communautés europeénnes*, pp.62-63.

are fulfilled: firstly that the Community legal order has changed, secondly that it has changed effectively, and thirdly that that change has taken place in a manner not anticipated or provided by the original order.

Has the Community legal order changed?

This question immediately raises another: to what extent must the legal order be different in order to judge that it has 'changed'? On Kelsen's discussion of revolutions, it would seem that it has 'changed' if new norms of the order are no longer compatible with the old Grundnorm: a new Grundnorm must be presupposed in relation to those new norms. Therefore the Community legal order has changed if there are now norms which are incompatible with the understanding of the Community as resting on the norm of international law which validates treaties. Thus norms of Community law which exclude or directly contradict the norms of international law regarding the interpretation and operation of treaties would be evidence of a 'revolution' in Community law.

It is important to emphasise that these tests differ in certain respects from the arguments adduced in favour of the process of constitutionalization of the Treaties. Discussing the juridical nature of the Community, Jacqué puts the debate in terms of 'international treaty or constitution'.[89] However, the concept of 'constitution' used in contradistinction to 'treaty' resembles more closely not the 'logical constitution' as Grundnorm but Kelsen's category of *written* constitution.

In this context, the constitution is to be understood in the 'logical sense' of Kelsen's various senses of the word, by which is meant simply the norm or norms that determine how the general norms of the legal order that constitute

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[89] Jacqué, "Cours généralde de droit communautaire", p.256: "Il n'est pas indifférent de savoir si l'on doit qualifier le Traité de traité international ou de constitution."

the Community are to be created.[90] In this sense, every constitutive charter of an international charter is a constitution, and that is in fact how Kelsen describes the charter of the United Nations.[91]

The issue here is therefore not a choice between international treaty and constitution, but whether that 'logical constitution' is composed of a norm of international law, or by a Grundnorm, a norm not of any positive legal system but a norm presupposed in relation to Community law in order to comprehend it as a normative order. It asks whether the highest norms of the Community, those regarding the validity of Treaties, have changed from norms of international law regarding the legality of all treaties, to a norm which presumes the Community to be valid on its own terms.

Jacqué, in his discussion of the process of 'constitutionalization', concludes that the term 'constitution' must entail a certain level of content, that it must be the "porteuse d'un projet social, d'un idéal de société".[92] It could be argued that Kelsen's theory relating to changes in the Grundnorm also requires this understanding of constitution, since in a typical revolution the 'projet social' is, clearly, changed, and a new constitution inaugurated. However, the present reading of Kelsen's theory on this point relies on his extremely broad definition of a revolution as any process in which the valid constitution is amended or replaced in a way that it itself did not provide for. This definition, it is suggested, would include a quiet change in the Community's constitutive norms, without demanding a reconsideration of the Community's 'projet social'.

It is also true, however, that the concept of a constitution normally includes the claim to autonomy or presupposition of independence that is embodied in

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[90] PTL, p.198.

[91] Kelsen, *The Law of the United Nations*, p.330.

[92] Jacqué, "Cours généralde de droit communautaire", p.267.

Kelsen's theory by the concept of the basic norm. The claim to autonomy is usually made in terms of the claim to a constitution.

Since *Van Gend*[93] the Court has developed its vision of the Community to the extent that the Treaties are now understood to be a "constitutional charter of a Community based on the rule of law", establishing a new legal order, *as opposed to* a 'standard' international treaty (the EEA Agreement) of a 'normal' intergovernmental character'.[94] It would seem that in the eyes of the Court of Justice, the Community is no longer constituted by international law but has a claim to autonomy and validity independent of any legitimation by norms of international law.

This claim regarding the constitutional nature of the Treaties has been repeatedly made since the first use of the phrase 'constitutional charter' by the Court in its judgment in *Les Verts*.[95] Neither are the claims of independence restricted only to the ECJ. The German Federal Constitutional Court (Bundesverfassungsgericht), for example, describes Community law as an order which "is neither a component of the national legal system nor international law, but forms an independent system of law flowing from an autonomous legal source".[96]

There are also strong arguments to show that the Community operates without reference to norms of international law. As Jacqué points out, the constitutional (for our purposes, changed) nature of the Treaties shows itself in the exclusion

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[93] *Van Gend*, Case 26/62, [1963] ECR 1.

[94] Opinion 1/91, 14 December 1991, [1991] ECR I-6079, para. 21 of the judgment.

[95] *Les Verts-Parti Ecologiste* v *European Parliament*, Case 294/83, [1986] ECR 1339, para. 23 of the judgment.

[96] *Internationale Handelsgesellschaft* v *EVGF*, decision of the Bundesverfassungsgericht, 29 May 1974, [1974] 2 CMLR at 549, para. 19 of the judgment.

of rules of international law in the case of their revision.[97] Under international law, the parties to a treaty may revoke or change it at any time, even disregarding provisions within the treaty establishing a special procedure to be followed.[98] If the procedures provided in the Community treaties[99] are binding on the Member States, who could not therefore amend or revoke them in the way provided by international law, it would suggest that the Community legal order has changed.

Pescatore points out that the Treaties have in fact been revised without recourse to the prescribed procedures, in accordance with international law: firstly in the Treaty of 27 October 1956, regarding the return of the Saar to Germany, and secondly in the Convention on Certain Institutions Common to the European Communities, signed at the same time as the EEC and Euratom Treaties.[100]

However, both these cases occurred early on in the history of the Community. Since then, the Court of Justice has put its opinion on the side of the mandatory nature of the Treaty amendment procedures. In *Defrenne*, the Court says that, apart from expressly recognised exceptions in the Treaty itself, the EC Treaty "can only be modified by means of the amendment procedure carried out in accordance with Article 236".[101] The Council has expressed the same opinion.[102] Since under international law such a restriction would be illegal, it seems that the Community legal order now contains norms incompatible with a

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[97] Jacqué, "Cours générale de droit communautaire", p.269: "Le caractère constitutionnel des traités se manifeste essentiellement dans l'exclusion du jeu des règles de droit international en ce qui concerne la révision des traités".

[98] Under the Vienna Convention on the Law of Treaties, signed on 23 May 1968.

[99] The procedure laid down by the Treaties regarding their revision is to be found in Article 48 of the TEU, which has replaced the Article 236 procedure through the amendments made by the TEU and TA.

[100] Pescatore, *L'ordre juridique des Communautés européennes*, pp.62-63.

[101] *Defrenne* v *Sabena*, Case 43/75 [1976] ECR 455, at para. 58 of the judgment. Article 236 of the EC Treaty has been replaced by a similarly worded Article 48 in the TEU.

[102] Reply of the Council to written question 398/77, OJ C 270, 10 November 1977, 18.

Community basic norm of *pacta sunt servanda* and has therefore changed. However, is this change a 'revolutionary' change?

Has the change in the Community legal order taken place in a manner not anticipated or provided for by the original order?

This test means that the changes in the Community order must be illegitimate in terms of the international legal system. Norms which would prevent amendments being made to the Treaties outside the provisions of those Treaties themselves are in direct contradiction to the norms of international law contained in the Vienna Convention regarding the amendment and annulment of treaties. Therefore, assuming that the Community legal order now contains those norms, there has been a revolutionary change which is illegal from the viewpoint of international law. Is this change effective, however?

Has the Community legal order changed effectively?

It is this question that can be answered neither in the positive nor in the negative. According to Kelsen, a norm is effective if, firstly, it is obeyed, and, secondly, if not obeyed, the sanction is applied by the official whom the norm directs to apply it.[103] It would initially seem that the norms in question are obeyed and will continue to be obeyed. With regard to Article 236, for example, Cruz Vilaça and Piçarra conclude that "l'article 236 constitue pour les Etats membres une disposition indubitablement obligatoire" and that "les Etats membres ne peuvent, d'un commun accord, se prévaloir des principes relatifs à la révision des traités en droit international pour méconnaître les limites formalles et processuelles à la révision du traité prévues à l'article 236".[104] Jacqué

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[103] GTLS p.62, PTL p.116.

[104] da Cruz Vilaça and Piçarra, "Y a-t-il des limites matérielles à la révision des traités instituant les communautés européennes?", p.16.

also notes that "l'attachement au respect de la procédure de l'article 236 paraît général".[105]

However, they also note that "malgré tout, une décision unanime des Etats membres réunirait, *de facto*, les conditions pour mettre un terme à la Communauté européenne et à son order juridique ou pour en modifier radicalement sa nature".[106] There has been no opportunity to verify, since the development of express norms limiting revision of the Community treaties, that a breach of those limits would give rise to a sanction. Arguments that the Community is effectively autonomous are met with arguments that it is effectively a part of international law: the question of effectiveness is not resolved.

2.3 Indeterminate autonomy: embracing difference through fiction

Harris notes that in these cases, in which "a revolution is literally in balance", the question whether the Grundnorm has or has not changed "is nevertheless 'objective' in the same way that any judgment about future matters of fact is objective". However, "[n]o such judgment can be made with certainty and many such judgments turn out to have been wrong".[107]

If the Community were to have a Grundnorm presupposed in relation to it, the form of the Grundnorm would validate the norm-creating effect of custom.[108] Kelsen does not give a suggested form of a Grundnorm which is presupposed in the case of a national legal order whose constitutional norms have been established by custom, but following that of international law, it would have the

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[105] Jacqué, "Cours généralde de droit communautaire", p.272.

[106] da Cruz Vilaça and Piçarra, *op. cit.*, p.37.

[107] Harris, "When and Why Does the Grundnorm Change?" p.122.

[108] This is so in the absence of a written constitutional norm validating custom as a source of law: see *infra* p.19.

form: "Coercive acts ought to be carried out under the conditions, and in the manner, that conforms with the custom constituted by the actual behaviour of the members of the Community".[109] Yet in the absence of a decisive resolution of the question of effectiveness, it is precisely this 'actual behaviour' that is indeterminate.

For the Hartian this is a problem. On Hart's theory, Community law does not exist as a legal system without a 'rule of recognition', which is a rule which provides "authoritative criteria for identifying primary rules of obligation".[110] This rule of recognition exists as a matter of fact: it exists "as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria".[111]

The existence of the rule of recognition is therefore subject to a sociological test. A body of law exists as a system only if there is actual and observable acceptance of a particular rule which describes the criteria that must be used to identify the rules of that system. There are two ways in which such an empirical test is inappropriate for the Community. Firstly, only massive and detailed sociological research could give any inkling of the criteria employed by each official of the Community system. Secondly, to require 'concordant' practice is to chase a chimera through the Community, in which the officials of the system may not even know upon which fundamental criteria they should identify Community norms.

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[109] Kelsen's suggested Grundnorm of international law is: "Coercion of State against State ought to be exercised under the conditions and in the manner, that conforms with the custom constituted by the actual behaviour of the States" (PTL, p.216). Kelsen also suggests that custom is created by an act of will "individual or collective" (pp.225-226), which Harris interprets as authorising the population at large "to fashion the ultimate norms of the constitution in any way which meets with general approval": Harris, "When and Why Does the Grundnorm Change?", p.111. Harris thus formulates the Grundnorm of the United Kingdom (which has no written constitution) as: "Coercive acts ought to be applied only under the conditions and in the ways customarily recognised as constitutional from time to time by the population at large" (p.111). Harris' interpretation has been followed here.

[110] CL, p.97.

Hart's idea of a single rule containing criteria of recognition may have been adequate for 1950s Britain, in which there was little uncertainty about the criteria of recognition of the system's norms. Although Hart offers no detailed empirical evidence to demonstrate that the grand part of English officials identify the norms of the English legal system on the basis of generally accepted practice such as that 'whatever the Queen in Parliament enacts is law', his assertion that this was so was accepted since for all intents and purposes this was what happened. With the advent and development of the Community, however, this complacency can no longer be accepted. Apart from the myriad opinions on the nature of the Community legal order, the effect of Community law directly into the systems of the Member States renders each official a member of not just one legal system, but two, compounding the problem of empirical substantiation.

Perhaps this is only a practical objection to Hart's theory and should not be exaggerated. However, there are more fundamental objections to the nature of the rule of recognition as an empirical criterion. The 'identity crisis' of the Community legal order arises because officials know that they cannot capriciously decide to accept particular criteria of recognition. In Harris' words, "[o]fficials accept rules as members of their systems, not because they *choose* to recognize them, but because they are *bound* to recognize them".[112] This must apply to the rule of recognition just as to every other rule of law. Yet what is to be done in a situation of indeterminacy such that it is not clear what rule the official is bound to recognize?

The Community official, on Hart's theory, must simply choose: he must apply either the norms of international law, or a norm which prescribes that 'whatever is enacted under the Treaties is law', otherwise there is no Community legal system. Thus it becomes clear that Hart's theory equates the choice of a norm

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[111] CL, p.107.

with the validity, or binding force of a norm: the official is forced into concluding, illogically, that 'this norm is recognized, therefore it ought to be recognized'. As was argued in Chapter One, Hart implausibly reduces the normativity (the authority) of law to the mere fact of its effectiveness.

Kelsen's theory of legal system avoids the difficulties associated with the 'identity crisis' since, for him, there is no necessity to identify an actual fundamental rule of the legal system which provides that system's unifying criterion of validity. This is because the Grundnorm is *not* a sociological entity: "no amount of empirical enquiry can establish that it does or does not exist as a psychological or sociological phenomenon".[113]

As opposed to the rule of recognition, which must be open to sociological proof, the content of the Grundnorm does not have to be subject to a process of verification.[114] On the contrary, it is "an aid to thinking"[115] that is to be understood as a fiction: "the presupposition of the basic norm is a typical case of a fiction in the sense of Vaihinger's *Philosophie des Als-Ob*".[116]

A fiction in this sense "is characterized by its...containing contradiction within itself".[117] It is not "a presupposition about reality which is in principle verifiable", it is "a construct which is 'of service to discursive thought'".[118] As such, the uncertainty as to the efficacy of the various possible highest norms of the Community legal order does not undermine or refute Kelsen's theory of

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[112] Harris, *Law and Legal Science,* p.74.

[113] Harris, "When and Why Does the Grundnorm Change?", p.117, footnote 57a.

[114] See Hughes, "Validity and the Basic Norm", particularly pp.699-701, for an opposing view.

[115] Kelsen, "The Function of a Constitution", p.117.

[116] Kelsen, "On the Pure Theory of Law", p.6.

[117] Kelsen, "The Function of a Constitution", p.117.

[118] Harris, *Law and Legal Science,* p.79, referring to H. Vaihinger, *The Philosophy of 'As If'* (1924), pp.85-90.

legal system. In fact, it has the beneficial effect of spotlighting the real battleground of the Community 'revolution': the parliaments and governments and people of Europe. Dowrick complains that "the absence of a clearly recognised basic norm only serves to highlight the various sources of EC law and their rivalry for supremacy".[119] But this is precisely the *strength* of the Grundnorm analysis: it is futile to offer a theory that ignores the difference, diversity, and indeterminacy that permeate Community law.

This is true as much for the subject of the next section, the relationship between the Member State, international and Community legal orders, as for the independence of the Community legal system. Kelsen's theory of legal system allows us to proceed as if the European Community were an autonomous legal order, a basic norm presupposed in relation to it. Yet the theme of diversity continues, as Kelsen offers again an angle from which to embrace a plurality of visions of the authority of the Community legal system.

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[119] Dowrick, "A Model of the European Communities' Legal System", p.185.

Part Three

Authority

Chapter Three

The Legal Scientist

Introduction

In the last chapter, I tried to show how the existence of the European Community as a legal system or as an autonomous legal order is not an empirically verifiable fact, but a particular understanding that is the result of a decision to adopt a particular point of view. The detached normative perspective showed us how various hypotheses about the source of the Community's independence and authority cannot, from that perspective, be resolved without personal choice. In this chapter I consider further the authority of European Community law and the implications of Community authority for the classic theory of Member State sovereignty. I shall continue to refer to the Community rather than the Union although, as I hope to have shown in Chapter Two, the chain of norms does not respect organisational labels.

3.1 Authority and sovereignty

One of the fundamental qualities of law is that it is, or at least claims to be, authoritative. We may have various reasons for action, but a reason which is legal is a reason which claims precedence over the others. To say that the law has authority means that it is normative; it imposes obligations upon its subjects. To have authority, suggests Kelsen, is to have "the right or power to issue obligating commands".[1]

Why is our law authoritative? The answer to this question, posed in the context of the traditional nation State, is sovereignty. The law has authority because it is created by an authority - the sovereign. The 'sovereign' may be a monarch, or parliament, or any other particular institution, or it may be a specific collectivity such as the people or the nation. Whatever or whoever the holder of sovereignty is finally determined to be, sovereignty refers, in a loose sense, to the ultimate source of authority within the State.[2]

Anzilotti contrasts this 'internal' concept of sovereignty with the 'external', by which is meant that a sovereign State has over it no other authority than that of international law.[3] Both the internal and external concepts of sovereignty are connected, however, since sovereignty refers to that area of conduct in which the State is autonomous;[4] if in fact there is some form of international authority to which the State is subject, both its external and internal sovereignty will be limited to that extent.

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[1] GTLS, p.383. The concept of authority is discussed more fully below, in Chapter Four.

[2] See de Witte, "Sovereignty and European Integration: The Weight of Legal Tradition", pp.146-7. De Witte clarifies that this is a 'loose' definition because it may not correspond to the understanding of sovereignty used within a particular State (p.147).

[3] Anzilotti, Individual Opinion in the Austro-German Customs Regime case, PCIJ Ser. A/B no.41 (1931), 57, cited by de Witte, *op. cit.*, p.146.

[4] See CL, p.217.

Clearly, the European Community is an authority external to the Member States, an authority which has an impact on their sovereignty. As the debates on the expansion of the Union and on the process of monetary union demonstrate, one of the most sensitive issues within the European Union is the protection of national sovereignty in relation to the phenomenon of increasing power at the European level. However, it cannot be doubted that the Member States no longer have the traditional sovereignty of action they once enjoyed. As Marquardt puts it, "[t]he Member States have all accepted a regime in which the national government is no longer the supreme law-making authority within the state and national authorities can find themselves without authority to act in the face of superior Community law...Despite frequent invocation of the rhetoric of national parliamentary sovereignty, especially in Britain, it is already gone in its absolute form".[5]

The British experience is a good example of the effect that the competing authority of European Community law has had upon the Member States' traditional doctrines of sovereignty. In the United Kingdom, the classic statement of the doctrine of the sovereignty of parliament comes from Blackstone: "True it is, that what the parliament doth, no authority upon earth can undo".[6] Parliament, in Dicey's words, has the right to "make or unmake any law whatever".[7] However, since the judgment of the House of Lords in the *Factortame* case,[8] true it is no longer; the House in this case upheld the supremacy of European Community law over later British statutory law. According to Wade, the result is that "while Britain remains in the Community we are in a regime in which Parliament has bound its successors successfully,

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[5] Marquardt, "Subsidiarity and Sovereignty in the European Union", p.634.

[6] Sir William Blackstone, *Commentaries on the Law of England*, Vol. I, Book 2, p.161, discussed in Craig, "Public Law, Sovereignty and Citizenship", pp.320-324.

[7] Dicey, *Introduction to the Study of the Law of the Constitution*, p.40.

[8] *R* v *Secretary of State for Transport ex parte Factortame Ltd (No.2)*, [1991] 1 All ER 70.

and which is nothing if not revolutionary".[9] In Wade's opinion, the "only remnant of the old unqualified sovereignty is Parliament's ability to legislate in deliberate breach of the Treaty".[10]

What does legal theory make of these changes? Austin's theory of law, for example, gives the concept of a sovereign pride of place. He defines law as a species of command, supported by the threat of sanctions, and issued directly or indirectly by the sovereign of a political society. This sovereign, according to the interpretation of Austin given by Hart in his well-known critique of Austin's theory,[11] must be identifiable as a particular person or group of persons (Austin himself identified the electors as constituting the sovereign body).[12] MacCormick has shown how implausible this concept of law is in the context of the overlapping Member State and Community legal systems, in which even widening the theory to accommodate shared delegation of power by a group of sovereigns fails to satisfactorily explain the source of authority in the Community.[13]

In Austin's defence, it must be noted that Hart and MacCormick's interpretation of his work as demanding that law stem from identifiable individuals or persons has not gone unchallenged: Cotterrell, for example, argues that although Austin writes of the sovereign as a person (for example, an absolute monarch) or a body of persons (for example, the electorate of a democracy), he "always means by the sovereign the office or institution which happens to hold supreme authority; never the individuals who happen to hold that office or embody that institution through their relationships at any given

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[9] Wade, "Sovereignty – Revolution or Evolution?", p.571. For a detailed examination of the future of the British doctrine of parliamentary sovereignty after the *Factortame* judgment, see also Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*".

[10] Wade, "What has Happened to the Sovereignty of Parliament?", p.3.

[11] See CL, chapters 2 to 4.

[12] See CL, p.72.

[13] MacCormick, "Beyond the Sovereign State", pp.4-5.

time".[14] According to Cotterrell, Austin's sovereign is an abstraction, simply the "location of the ultimate power which allows the creation of law in a society".[15]

This abstract conception of sovereignty is far more promising, but is still tainted by the problems inherent in Austin's over-simplistic characterisation of law as constituted by orders backed by threats and sustained by a habit of obedience. Whatever the merits of Hart's interpretation of Austin's concept of sovereignty, his critique of Austin's general theory does accurately pinpoint its failure to account for the 'internal point of view' and the normativity - and authority - of law.[16] To understand sovereignty entails understanding the nature of the authority of the law-makers. Within legal philosophy this requires that our theory of law is able to distinguish between two contrasting things: on the one hand, large-scale voluntary co-operative organisations, and on the other, systematic control by gangsters.[17] Austin's theory fails in this respect: his commands and sanctions would be consistent with 'sovereign' gangsters.

Austin's mistake is to ground sovereignty in the political 'fact' of the seat of power within a State. Sovereignty becomes simply the power to command, and therefore sovereignty, as the expression of power, is prior to the law. But this, as Kelsen argues, is "in truth nothing other than the expression of the facticity of the law":[18]

> "Physical power, a mere natural phenomenon, can never be 'sovereign' in the proper sense of the word. Only a normative order can be 'sovereign', that is to say, a supreme authority, the ultimate reason for the validity of

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[14] Cotterrell, *The Politics of Jurisprudence*, p.67.

[15] *Ibid.*

[16] See the discussion *infra.*, Chapter One.

[17] This point is put with great clarity by Anscombe in "On the Source of the Authority of the State", p.143.

[18] Kelsen, *Il problema della sovranità*, at p.47. For a discussion of Kelsen's critique of Austinian views of sovereignty, see Paulson, "Methodological Dualism in Kelsen's *Das Problem der Souveränität*".

norms which one individual is authorised to issue as 'commands' and other individual are obliged to obey".[19]

Sovereignty and authority, which are normative, cannot be so reduced to a set of factual conditions. Instead, sovereignty should be redefined as the ultimate source of *legal* authority within a state: "la souveraineté est un caractère de l'État parce qu'elle est un caractère du droit".[20]

If Kelsen's view that sovereignty must be analysed with reference to its connection to law and legal authority is accepted, the most difficult issue in the Community context becomes that of the relationship between the legal orders of the Member States, European Community and international community. The older problem of the relationship between the international and national legal orders is traditionally resolved through the adoption of either the 'monist' or 'dualist' doctrines. Under the dualist conception, the international and national legal systems are considered to be independent and separate. Norms of international law, such as those of an treaty, are not valid within the national legal order until they have been explicitly incorporated into domestic law. The monist view, on the contrary, perceives national and international law to be one unified system, and so norms of international law are immediately valid within the national order.

Kelsen argues that a monistic construction is 'inevitable' - a position which initially seems glaringly mistaken given the express adoption in many countries of a dualist approach. Here however we are not discussing the choice between monism and dualism within a particular legal system, but the theoretical problem of the relationship between any two or more legal orders which normatively overlap (by which is meant that norms from both systems may

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[19] GTLS, p.383.

[20] Kelsen, "Les rapports de système entre le droit interne et le droit international public", p.255.

claim to regulate the same behaviour of the same people at the same time). Kelsen is speaking not of organisational but of cognitive unity. Referring to the European Community, Neil MacCormick expressly contrasts Kelsen's monistic theory with a "pluralistic or polycentric approach" based on Hart's theory of law, claiming superiority for the latter.[21] It will be argued here, however, that Kelsen's monist theory *is* compatible with the individuality and autonomy of the Member States' legal orders, and that his model offers, paradoxically, far more scope for a pluralistic approach to the relationship between the international, national, and Community legal orders.

3.2 Relationships between legal orders: Hart

Various authors have suggested that an approach based upon Hart's concept of law offers the best theory of the way they interact. MacCormick, for example, has argued that a Hartian approach has the advantage of "[relativising] questions of system and validity, without excluding possibilities of interaction and overlapping between systems".[22] Hart's theory is said to give the basis for a pluralistic conception of law as system, as opposed to Kelsen's monistic model; a conception which "allows of the possibility that different systems can overlap and interact, without necessarily requiring that one be subordinate or hierarchically inferior to the other or some third system".[23]

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[21] MacCormick, "Beyond the Sovereign State", p.9

[22] MacCormick, "Beyond the Sovereign State", p.6. It must be said immediately that MacCormick has since changed his position to a form of Kelsenian monism, a shift which is discussed below. However, Hart's theory of law has been variously invoked and the preference for Kelsen's theory here expressed cannot be justified without a consideration of Hart. MacCormick's original Hartian analysis is used as a subject for critique here since it remains the most fully developed with regard to the relationship between legal orders. See, for other Hartian analyses, Jones, "The Legal Nature of the European Community: A Jurisprudential Model Using H.L.A. Hart's Model of Law and Legal System"; Starr, "Hart's Rule of Recognition and the EEC".

[23] MacCormick, *ibid*, p.8.

In Hart's theory, the validity and authority of laws is founded upon the rule of recognition, which contains the "authoritative criteria for identifying primary rules of obligation".[24] MacCormick develops his argument for a Hartian approach to Community law by giving the outlines of two possible rules of recognition, one for the law of the UK and the other for the law of the EC. He writes:

> "[F]rom the point of view of UK law (and *mutatis mutandis* for other Member States), the grounds of validity of Community law in a UK setting...may be different from those that validate the same rules in specifically Communitarian terms".[25]

In other words, a rule may be validated by two rules of recognition. This entails that there are two separate legal orders, each with their own distinct rule of recognition, and that the rule in question belongs to both orders at the same time.

Yet this seems to be incompatible with the nature of the rule of recognition. Hart emphasises that the rule of recognition is both ultimate and supreme. It is supreme since rules identified as valid by reference to it "are still recognised as rules of the system, even if they conflict with rules identified with reference to the other criteria, whereas rules identified by reference to the latter are not so recognized if they conflict with the rules identified by reference to the supreme criterion".[26] It is ultimate since it provides criteria for the assessment of the validity of other rules, but is unlike them in that there is no rule providing criteria for the assessment of its own legal validity. Since a rule of recognition must be supreme over all other criteria of validity, it cannot admit of rivals.

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[24] CL, p.97.

[25] MacCormick, "Beyond the Sovereign State", pp.7-8.

[26] CL, p.103.

However, a reply to this objection is to be found within MacCormick's analysis. As we saw, according to MacCormick there would be two rules of recognition, each with a different content, that both apply to the overlap between the two respective systems. MacCormick writes that "[p]rovided the same rules are in fact acknowledged as valid in the area of overlap, this will not lead to incompatibility or conflict...".[27] Yet now another objection immediately arises: since the rules of recognition are those of separate legal systems and are necessarily different, there will always be conflict and incompatibility in the area of overlap. The only solution is for there to exist criteria in both the rules of recognition which provide for the supremacy of *one* of them in the case of conflict. In fact, this is clearly the response adopted in MacCormick's chosen example of *Factortame*, and in a long list of judgments which assert the primacy of Community law over national law.

This solution does not sustain the pluralistic conception of law as system that MacCormick wishes to offer. Since the criteria of validity in one system ultimately bow to criteria within the other, in terms of the hierarchy of rules they are logically one system, which has its apex in only one rule of recognition. This model leans more towards Kelsen's monistic view of the relationship between legal systems, rather than a pluralistic view. In fact, it is difficult to see upon what basis Hart's theory can be said to accommodate a pluralist model of legal orders.[28] Where Hart does explicitly criticise Kelsen's monist approach to the relation between international and national law, he firstly does so simply on the ground that international law is not a legal system at all, but only a set of rules, which contains no rule of recognition.[29] Yet although it may still be possible to deny that international law is a fully-fledged legal system,

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[27] MacCormick, "Beyond the Sovereign State". p.8.

[28] It must be said that MacCormick's claim on this point is carefully spelt out to be that only the basis and potential of the argument can be found in Hart's work. Yet if one finds bias towards either the monist or pluralist approach it would seem to be the monist, given the hierarchical, supreme and ultimate nature of the concept of a rule of recognition.

Community law, as we saw above, does form a legal order, and the issue of interaction between orders cannot be side-stepped.

Hart's second criticism of Kelsen is based upon the argument that Kelsen fails to give adequate import to the facts of making and recognising laws and the effectiveness of legal systems.[30] He understands Kelsen's doctrine of the unity of law (monism) to mean that a legal system can be identified by individuating all the laws belonging to one chain of validity - which laws thus form a legal system. This, however, ignores "the dividing line introduced by the idea that recognition by the law-identifying and law-enforcing agencies effective in a given territory is of crucial importance in determining the system to which laws belong".[31] And it is clear that, as Raz says, "the attitude of the population and the courts is of the utmost importance in deciding the identity and unity of a legal system in the sense in which this concept is commonly used".[32]

If Kelsen's theory of monism were to be interpreted in the way that Hart proposes, his objections would be persuasive. It is true that Kelsen is confusing on this point, and Raz supports Hart in criticising Kelsen's unity doctrine in relation to this understanding of legal systems.[33] However, the doctrine can also be interpreted in another way, a way which I would suggest is closer to Kelsen's text with regard to his analysis of the interaction between legal orders, and which does not fall victim to Hart and Raz's criticisms. In fact, Raz himself discusses and approves this second interpretation of Kelsen's monism.[34] This

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[29] See CL, ch.10, section 5 (pp.226-231).

[30] This criticism is to be found in Hart, "Kelsen's Doctrine of the Unity of Law", particularly p.313 and pp.320-321.

[31] Hart, *ibid.*, p.336.

[32] Raz, *The Authority of Law*, p.128.

[33] *Ibid.*, pp.122-129.

[34] *Ibid.*, pp.141-145.

interpretation is centred upon the point that Kelsen's doctrine of monism does *not* refer to 'legal system' in the sense in which this concept is commonly used.

3.3 Monism revisited

In using the term 'legal system' we generally have in mind the institutions and organisation that characterise a particular body of law. Legal systems have complex institutional structures; as Harris says, "the expression 'developed legal system' is commonly used to refer to the typical panoply of such institutions to be found in a contemporary industrialized society".[35] The dualist or pluralist conception of the relationship between the international and national legal orders holds them to be separate and independent, and if we are thinking of legal systems in this typical way this is obviously true: organisationally, they are divided from each other, they are accompanied by their particular political and social systems and related institutions.

However, this is not Kelsen's meaning when he uses the term 'legal order' or 'system'. Neither does he deny that legal orders are generally separated from one another in an organisational sense. He makes it clear that his concept of the unity of law is to be understood not as organisational but as *cognitive*. I quote:

> "[A]s the ultimate goal of the legal development directed toward increasing centralization, appears the organizational unity of a universal legal community...At this time, however, *there is no such thing. Only in our cognition of law may we assert the unity of all law* by showing that we can comprehend international law together with the national legal orders as one system of norms...".[36]

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[35] Harris, *Law and Legal Science*, p.13.

[36] PTL, p.328 (emphasis added).

The doctrine of the unity of law is only to be understood as part and parcel of the perspective which chooses to interpret law as normative, authoritative, through the presupposition of the basic norm.

In fact, monism can only be understood as the cognition of law from one particular perspective, a point missed by Hart and by MacCormick. Hart's last objection to Kelsen's theory is that Kelsen "disregards the important fact that...descriptive-ought statements when true are true only relatively to the systems that they describe".[37] MacCormick picks up this criticism, arguing that monism flies in the face of the attitudes and beliefs of those working within a particular legal order. English judges, for example, view their authority as based upon the British legal system and in no way contingent upon validation of that system by international law; British politicians do not regard British sovereignty as conferred by international law.[38]

The discussion in Chapter One of the committed and the detached normative perspectives will have already shown that Kelsen's theory is sensitive to the possibility of different points of view relative to law. Hart and MacCormick offer no objection to monism. The opposite in fact: applied to the Community, Kelsen's theory can accommodate the diversity of beliefs and viewpoints within the Member State and Community systems without allowing it to challenge and fragment the unity of the law which is the object of those viewpoints. This is because from each single point of view, the law must be a unity: "regarded from

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[37] Hart, "Kelsen's Doctrine of the Unity of Law", p.331.

[38] See MacCormick, "Beyond the Sovereign State", pp.8-9. MacCormick then retracts in "Liberalism, Nationalism, and the Post-Sovereign State", saying that Kelsen does take the internal point of view into account (p.147). Once he had made this step it was no longer clear why he prefered the Hartian over the Kelsenian model, and in fact in his most recent work he has changed to a kind of monism (see "Constitutional Pluralism in the European Union: Are Collisions Avoidable?" and chapter 7 of *Questioning Sovereignty*). This shift is discussed in the text below.

one point of view every set of norms necessarily forms one consistent and unified normative order".[39]

Let us, for example, take a European Union citizen. Her behaviour is regulated by many different norms, but legally, by norms of her national legal system, by norms of European Community law, and by norms of international law. Her sphere of behaviour is one unified whole, which maybe once was legally regulated entirely by norms belonging to the national legal order. Now however, her behaviour is regulated by a plurality of legal systems, but that law must logically form a unity *from her point of view* if she interprets those laws as normative, and not, for example, as sociological motivations to act.[40]

As Raz points out, our Union citizen may *feel* that some of the norms which regulate her behaviour conflict, but this is "a psychological, not a normative, fact". In Kelsen's words:

> "If one assumes that two systems of norms are considered as valid simultaneously from the same point of view, one must also assume a normative relation between them; one must assume the existence of a norm or order that regulates their mutual relations. Otherwise insoluble contradictions between the norms of each system are unavoidable".[41]

Thus the Union citizen, whose behaviour is governed by norms from various systems, and views those norms as valid, must view them as related in such a way as to form a cognitive unity.

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[39] Raz, *The Authority of Law*, p.138. Ronald Dworkin puts this idea in a slightly different way: "When Kelsen says that if international and municipal law conflicted, we could not speak of them both as valid at the same time, he means that someone who had to decide what he ought to do - a judge for instance - could not treat them both as valid in the conclusory sense, could not, in Kelsen's phrase, serve two masters": Dworkin, "Comments on the Unity of Law Doctrine", p.201. See also the discussion of the nature of the committed normative perspective *infra.*, Chapter One.

[40] Her point of departure, in the terminology of Chapter One, is the committed normative perspective.

This is not to say that diverse points of view cannot be appreciated or even adopted by one person. As we saw in Chapter One, an anarchist, for example, could approach the law first from his own viewpoint and then from that of legal science: "even an anarchist, if he were a professor of law, could describe positive law as a system of valid norms, without having to approve of this law".[42] The personal point of view and the point of view of legal science[43] are entirely different. Raz reminds us of Kelsen's position: "Norms judged as valid from a personal point of view are those adopted as just. But legal theory is value-free and norms judged to be valid from its point of view are not thereby adopted as just".[44]

However, cognition can only take one point of view at any one moment. This becomes clearer once we look at models of the cognitive unity of the international, national and Community legal orders, and realise that this unifying view of law is at the root of every normative description of the relationship between them.

Kelsen's initial view was that the international legal system must take primacy over the state legal system, thus co-ordinating all state legal systems in their spheres of validity.[45] However, in the later edition of *Reine Rechtslehre* he changes his mind, and argues that there are instead two possible monistic constructions, the first as before in which international law takes primacy, but the second in which national law has precedence.[46] Dealing with only two legal systems, the two constructions are relationships in which first the national and then the international takes precedence.

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[41] Kelsen, *What is Justice?*, p.284.

[42] PTL, p.218, note 82.

[43] The committed normative and the detached normative perspectives respectively.

[44] Raz, *The Authority of Law*, p.140.

[45] IPLT, p.120.

[46] PTL, pp.333-339.

3.4 Nine models

Adding European Community law, there are nine possible permutations of the chain of validity linking the three legal systems.[47] Six are models in which the validity (and therefore authority)[48] of two systems rests on the other (and therefore upon the Grundnorm of that system). Three are models in which two systems are co-ordinated, separated in their spheres of validity, by a third, higher-order system that governs their creation. They are here presented graphically: the international legal order is represented as 'INT', that of the Community as 'EC', and the Member State legal order as 'MS'.

There is only ever one Grundnorm, presupposed specifically in relation to one legal system, but finally validating all three legal systems. In the models set out below, the Grundnorm is always presupposed in relation to the highest legal order in the chain. This Grundnorm will be either that of international law, validating the norm-creating effect of international custom, that of national law, validating the national constitution or national custom, or that of Community law, validating the Community constitution or Community custom.

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[47] Compare MacCormick, "Liberalism, Nationalism, and the Post-Sovereign State", where he suggests that the monist theory can offer three models of the relationship between national, international and Community law. He assumes that the Grundnorm will be presupposed in relation only to the international legal order, and so discusses models equivalent to the first, second and seventh proposed here.

[48] Kelsen's use of 'validity' is interchangeable with 'authority'. The law has authority when the Grundnorm is presupposed - and 'an authority' is simply a person or institution competent to create valid norms (PTL, p.194).

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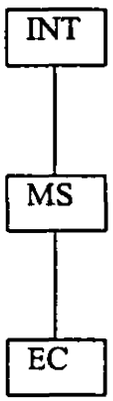
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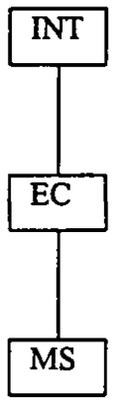
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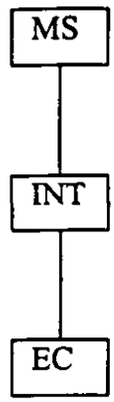
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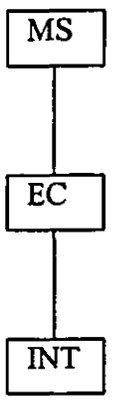
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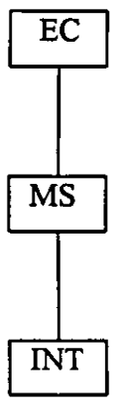
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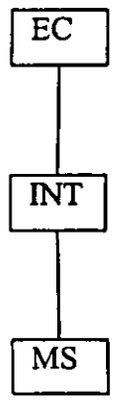
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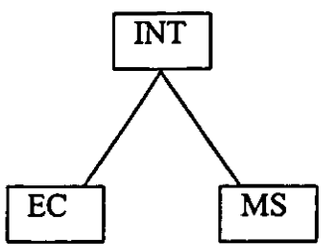
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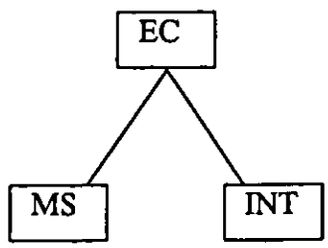
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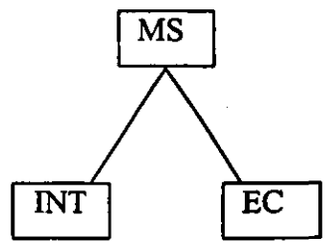
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Model 1

The Grundnorm is presupposed as validating the norm-creating effect of international custom. A norm of general international law is the basic norm of the national legal order: the norm of efficacy.[49] The national legal order then confers validity on the Community legal order through the norm which initially recognised Community law as valid for that nation State.[50]

Model 2

A norm of international law validates the Community system, through the effectiveness of either its customary or constitutional independence, which in turn confers validity on the Member State. The basic norm of the Member State must be a norm of Community law by which its acts are legal from the point of view of the Community order.[51] The basic norm of the Member State will therefore be the norm of Community law which admits the State into the Community, contained either in its particular Treaty of Accession or in the original Community Treaties.

Model 3

Here the international legal order is validated by the national legal order, and itself contains the basic norm of effectiveness of the Community order. The fact that the national order is co-ordinated by the international (and here also the Community) is not an obstacle for Kelsen. The national legal order is to be understood in a narrow and a wide sense: only in the narrow sense is it subject

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[49] PTL, p.337.

[50] PTL, p.333.

[51] PTL, p.337: "Since international law regulates the behavior of states, it must determine what is a 'state' in the sense of international law - it must determine...under what conditions their acts are to be regarded as acts of state, that is, legal acts in the meaning of international law". The European Community regulates the behaviour of its members, and so must determine, in this model, under what conditions their acts are to be regarded as acts in the meaning of Community law.

to the international norm of efficacy; in the wide sense it confers validity upon international and (indirectly, here) Community law.[52]

Model 4

The Member State legal order and the Community order respectively confer validity upon the Community and international legal orders.

Model 5

The Member State is validated by the Community norm under which it acceded to the Community; international law is brought within both through its authorisation by the Member State.

Model 6

The Community legal order confers validity on international law, which in turn validates the effective Member State.

Model 7

International law co-ordinates both Member State and Community law. A third, co-ordinating, higher order "determines the creation of the other two, delimits their spheres of validity against each other, and thus co-ordinates them".[53] As long as the creation and sphere of validity of Member State and Community law are effective, they are authorised by international law.

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[52] The legal order in the narrower sense "comprises the norms of the constitution and the norms created - in accordance with the constitution - by the acts of legislation, jurisdiction, and administration. The national legal order in the wider sense...includes the recognized international law...Figuratively speaking we may say: the state which recognizes international law thereby submits to international law". However, the ultimate reason for the national legal order's validity is not international law's principle of efficacy but the Grundnorm presupposed in relation to it (PTL p.340).

[53] PTL, p.332.

Model 8

Starting from the presupposed validity of the Community legal order, it confers validity through membership on the Member State, and validity through recognition on the international order.

Model 9

The Member State co-ordinates and confers validity on international and Community law.

The models are presented and viewed neutrally from Kelsen's 'point of view of legal science' - the point of view termed, in Chapter One, the detached, normative perspective. From this perspective they are presented as models which compete with each other but between which no choice is made. While from the point of view of a judge or an individual the extent to which a particular model reflects actual practice within the Community will be crucial, for the detached perspective it is of much less importance that certain of the models seem distant from reality.[54] For example, it may seem far-fetched to describe the Community as validating both the international and national legal orders when the debate regarding its own independence from both is still not closed. Yet this is the task of the science of law: to step back from the fray and set out the logically theoretical (the 'pure') possibilities, in order that our choice between them is an informed choice. The crux of Kelsen's theory at this point is that while each model is equally authentic, no one of them is argued to be 'correct'. In fact, Kelsen argues that it is not *possible* to decide between them on the basis of the science of law: "This science can do no more than describe them".[55]

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[54] Neil MacCormick evaluates each model on its plausibility in relation to actual Community practice, but Kelsen's conceptual approach rejects such empirical testing of his theory.

[55] PTL, p.346.

3.5 Sovereignty and the identity crisis

From the detached, normative viewpoint of legal science, each model is equally correct and equally justified. The decision can therefore "be made only on the basis of non-scientific, political considerations".[56] Thus of his two models of the relationship between national and international law Kelsen says that "he who treasures the idea of the sovereignty of his state...will prefer the primacy of the national legal order. He who values the idea of a legal organization of the world, will prefer the primacy of international law".[57]

Sovereignty, therefore, can play no part in a neutral conceptual modelling of the relationship between the Community, its member States and international law. To move from the presumption of the legal sovereignty of one's state is to *choose* to presuppose the validity of that legal order: a choice that is not required by the models themselves but is made for other motives. Kelsen argues that the concept of sovereignty is rooted in the presumption that the state in question is supreme, which presumption is underpinned not by logical arguments but by the "political design" to preserve the "notion that the state represents, in absolute terms, the highest legal community".[58]

Of course, in the era of state legal orders which were alone in regulating the entire sphere of behaviour of those subject to them, a model which understood law as founded on the validity of the state was the natural choice. Once the material sphere of competence of the State is fragmented between different legal orders, however, the question of legal authority is exposed in its garb of political

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[56] *Ibid.*

[57] *Ibid.* Looking back to Kelsen's earlier preference for the primacy of international law in the light of this later work, it is possible to identify the 'non-scientific, political' considerations upon which he bases his choice: he "values the idea of a legal organization of the world" and so rejects the concept of sovereignty and opposes the primacy of the nation state model on the grounds that it has the consequence of 'denaturing' international law's function of co-ordinating all states (*IPLT*, p.117).

[58] IPLT, pp.115-116.

power. Thus the uncertainty with respect to the legal basis and authority of the Community legal order simply reflects the indeterminacy of its competences.

Ian Ward argues that the constitutional identity of the Community remains undefined because there is a 'corporate uncertainty' as to how the Union should be determined.[59] The key to this indeterminacy in the Union is the concept of subsidiarity, which is particularly important since "the establishment of its identity...will determine the nature of the European legal and constitutional order".[60]

However, the manner in which subsidiarity was introduced into the Maastricht Treaty evidences the intention of the Member States to preserve uncertainty: "every effort was made at Maastricht to avoid providing any determination".[61] Subsidiarity "was never intended to be clear and concise. Indeed, its purpose was quite the opposite".[62] Through the ambiguity in its nature the "vexed question of the ceding of sovereignty"[63] could be successfully avoided, thus maintaining indeterminacy as "the conscious result of political expediency".[64]

The net effect of the political compromise which produced the concept of subsidiarity is "a constitutional order...which can mean anything to anybody"[65] and which, therefore, allows the Member States to preserve the fiction of State sovereignty. Since "[d]iscuter sur la souveraineté de l'Etat, c'est raisonner sur des

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59 Ward, "The European Constitution and the Nation State", p.165.

60 Ward, "Identity and Difference: The European Union and Postmodernism", p.24.

61 *Ibid.*

62 Ward, "The European Constitution and the Nation State", p.164.

63 Ward, *ibid.*, referring to Lord Mackenzie Stuart, "Subsidiarity - A Busted Flush?", in Curtin and O'Keeffe (eds), *Constitutional Adjudication in European Community Law and National Law.*

64 Ward, "(Pre)conceptions in European Law", p.203.

65 Ward, "The European Constitution and the Nation State", p.165.

hypothèses de science juridique",[66] the Member States are therefore holding on tight to a model of the relationship between the legal orders which allows them to presuppose the authority of their own.

3.6 Cognitive shuffling and normative conflict

A state of *legal* indeterminacy is only stable, however, as long as no *normative* challenge is made to it which challenges the *political* basis of the cognitive model adopted. Although there is no organisational hierarchy between legal orders, once the individual viewpoint is adopted the norms form not solely a cognitive unity but also a hierarchy, since there cannot be logical conflict between them.[67] Since the legal orders interact normatively, each time a norm is created or amended in one particular order, the cognitive arrangement of norms must, from our one particular viewpoint, be shuffled around in order to accommodate the change. Maastricht entailed, for example, a massive cognitive shuffling on the part of the Member States, to accommodate the new and changed norms within their pictures of the hierarchy of norms.

As we saw in Chapter One, an individual in her personal capacity (not, for example, in her capacity as a legal scientist) or an official within a legal order cannot remain at the level of simple cognition but must also choose between the models that cognition makes clear to her. In any committed, normative interpretation of Community law, international law and Member State law, therefore, one particular model must be adopted. It is possible to tease out from the views of commentators on the Community which model has been chosen, even if the reasons for this choice are not explicit. For example, underpinning the sovereignty rhetoric of the British 'Euro-sceptic' lies one of the models in which the national legal order is supreme, chosen since his reference system is

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[66] Kelsen, "Les rapports de système entre le droit interne et le droit international public", p.255.

[67] GTLS, pp.408-9; PTL, pp.18-19, 25, 205-8, 328.

firmly connected with the British legal order. The European Court in *Costa*[68] firmly adopts the seventh model, placing the Community on a level of co-ordination with its Member States. The Constitutional Court of the Federal German Republic in the Maastricht-Urteil case can be said to be championing the cause of the first model against that of the second.[69]

Problems arise when the model of authority chosen by one person or body contains norms which are incompatible with, and therefore challenge, the model of authority chosen by another. This situation would arise, for example, in the hypothesis given by the German Federal Constitutional Court in *Brunner*: if the EU institutions were to act outside the power conferred upon them by the EU Treaty.[70] Such an act on the part of the EU institutions would be incompatible with the view of the Constitutional Court as expressed in *Brunner* that they have no authority to do so. If the Court did accept the EU action, in doing so it would be revolutionising its model of sovereignty and authority.

3.7 Revolt? Revolution? Cold war?

The Kelsenian analysis here supports in certain respects the thesis recently defended by Diarmuid Rossa Phelan.[71] Phelan argues, firstly, that as a result of the demands placed upon national law by European Community law, national constitutional law "is at breaking point".[72] There is a crisis in the relationship between the legal orders, a crisis which has arisen because EC law and national law are, he believes, based on different legitimacies, because there are limits on

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[68] Case 6/64 *Costa* v *ENEL* [1964] ECR 585.

[69] *Brunner*, Judgment of Oct. 12, 1993, BverfG, 89 BVerfGE 155 (*Brunner* v *Treaty on European Union*); English translation [1994] 1 CMLR 57. This case involved a challenge to the validity of Germany's accession to the Maastricht Treaty. For a legal-theoretical analysis see MacCormick, "The Maastricht-Urteil: Sovereignty Now".

[70] *Brunner*, English translation [1994] 1 CMLR 57, at para. 49 of the judgment.

[71] Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*.

[72] *Ibid.*, p.10.

the extent to which national law can be amended, and because Community law views its status in national law and demands on national courts in a way that those national courts do not share. He argues that if EC law continues to develop along current lines the result within the Member State legal orders will be "either a revolution in law where consistent legitimation becomes impossible or a revolt of national constitutional authorities, the focal case being courts, to avoid a revolution".[73]

As was noted in Chapter One, Phelan takes up a particular point of view in order to explain the constitutional relationships between Member State and Community law, a method which is intrinsically connected to the development of his argument. He adopts what he calls an 'order approach', according to which:

> "The focus is on how the three legal orders of public international law, European Community law, and national law (more particularly, national constitutional law), by legal provisions, decisions, and other authoritative sources, describe themselves internally, their relations with the other orders and, so far as necessary to describe their relations with the other orders, those other orders".[74]

Phelan is careful to underline that the descriptions of law resulting from this method are not correct in "any general or external sense", by which he means a claim to correctness from all points of view, or independently of any point of view.[75] They "may be correct, in the sense of accurate, within the terms of that order. But that is all...".[76]

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[73] *Ibid.*, p.10; see also p.413.

[74] *Ibid.*, p.3.

[75] *Ibid.*, p.7 and see pp.6-7, note 11.

[76] *Ibid.*, p.7.

The dilemma of revolt or revolution will arise, he argues, because from the point of view internal to one order, the claims another order makes upon it may be impossible to accept. Conflicts are unavoidable because both legal orders make claims in the same areas.[77] For example, there may be an irresolvable conflict between what Phelan terms a 'national constitutional law natural right' and a European Community law right,[78] or between a national constitutional law policy and a European Community law policy.[79]

Kelsen's theory supports Phelan's method and argument here; in fact, Phelan's thesis is only tenable if a Kelsenian monistic approach is taken to the relationship between the international, Member State and Community legal orders. His discussion of conflicts between orders shows that he presumes that which Kelsen's theory demonstrates: that from a perspective 'internal to the order' (which would fall under the present terminological umbrella of the 'committed, normative perspective'), a set of norms must necessarily form a coherent unity.

> "If an insoluble conflict existed between international and national law, and if therefore a dualistic construction were indispensable, one could not regard international law as 'law' or even as a binding normative order, valid simultaneously with national law (assuming that the latter is regarded as a system of valid norms). The relations concerned could be interpreted only either from the viewpoint of the national legal order or from that of the international legal order".[80]

Only if a monist model is taken, will it follow that when norms from different legal orders simultaneously claim to be authoritative for the same behaviour of

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[77] *Ibid.*, p.14.

[78] *Ibid.*, ch. 30.

[79] *Ibid.*, ch. 31.

[80] PTL, p.329.

the same people at the same time, there will necessarily be a logical conflict which must be resolved - resolved within the European Union, for Phelan, by revolt or revolution.

Phelan's internal-to-the-order perspective presumes, however, a certain clarity and consensus within each particular order regarding that its own authority and legitimacy, a presumption which is open to criticism. Phelan claims to describe how the orders view themselves, but as the uncertainty noted in Chapter Two about the form of a Community Grundnorm shows, any claim about the source of legitimacy and authority of at least the Community and, it is suggested, even the Member States, can be and is likely to be contested. Phelan's order perspective does in fact differ from the committed normative point of view distinguished here, in that it claims to speak 'for' the order as a whole; the committed normative point of view is, more modestly, the personal point of view of the individual, or that of the judge. It is possible to envisage, for example, various points of view 'internal' to a legal order which do differ with respect to that order's legitimacy. To take a very simple example, one judge of the European Court of Justice may view the authority of Community law as derived from that of the Member States; another may view the authority of Community law as (independently of the Member States) derived, like that of the Member States, directly from its citizens.

Phelan is however correct to locate the arena of conflict between the legal orders in the courts of the Member States and Community. As he says,

> "[t]he conflict between orders will result in conflicts between courts because of...the extent of the overlap between the claims of European Community law and national law in respect of the same or different aspects of many justiciable actions".[81]

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[81] Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, p.15.

The nine models of authority and validity that result from taking the detached perspective on the European Community are only of academic interest within the courts, for a judge cannot, unlike a law professor, abstain from the 'volition' that distinguishes the committed from the detached point of view. It is in the nature of the judicial role that an authoritative decision must be given, even when that decision involves the very authority and legitimacy of the legal order itself. The central role of courts in situations of fundamental uncertainty is to be seen, for example, in constitutional cases from the 1950's and 60's that arose in revolutionary situations. In Pakistan, Uganda and what was then known as Rhodesia, courts were asked to judge the foundations of new legal orders and the legitimacy of revolutionary regimes. In these times of turmoil it was the lawyers who became 'demolition experts';[82] and the judges did not hold back from declaring the effect of a successful revolution upon the law in their respective jurisdictions.[83]

Fundamental issues regarding the legitimacy of both Community law and national law have already arisen in the courts: Phelan illustrates his thesis of conflicts between the legal orders with the *Grogan* case,[84] which he analyses as turning on a direct conflict between the Irish constitutional law right to life of the unborn and the European Community law right to receive services and information concerning services.[85] Another well-known case is obviously the *Brunner* decision, already noted. Weiler and Haltern have suggested that this decision, in which the German Federal Constitutional Court expressly rejected any suggestion that the balance of power between Germany and the Community would be resolved, through Maastricht, in favour of the

[82] S.A. de Smith, "Constitutional Lawyers in Revolutionary Situations", p.93.

[83] See Harris, "When and Why does the Grundnorm Change?", p.103. It is also to be noted that the courts of each of these countries cited Kelsen's theory of change in the Grundnorm as authority for their decisions (see Harris p.103-4).

[84] Case C-159/90 *Society for the Protection of the Unborn Child* v *Grogan* [1991] ECR I-4685.

[85] See Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, pp.374-400.

Community,[86] is analogous to the commencement of a cold war, "with its paradoxical guarantee of co-existence following the infamous MAD (Mutual Assured Destruction) logic".[87]

For the Community or a Member State to introduce a law that could only be accommodated by the other order if it were to change its understanding of the source of its own validity and authority would be politically to "deal the first blow".[88] Weiler and Haltern comment that the "logic of the Cold War is that each side has to assume the worst and to arm as if the other side would actually deal the first blow", and in the terms of this paper, the German Court's 'arming' was not only to repeat its presumption of the validity of its own legal order but to go on the offensive and doubt even the autonomy of that of the Community.[89]

The Court in *Brunner* denied that the European Court of Justice could legitimately have authority over its own competence, and effectively held that the authority to decide the competence of the European organs was vested in itself. Phelan would, presumably, applaud this decision, since his 'proposed direction' in response to the dilemma of revolt or revolution that he poses is that of authority placed firmly in the hands of national courts:

> "The proposal is that a European Community constitutional rule is adopted to the effect that the integration of European Community law into national law is limited to the extent necessary to avoid a legal revolution in national law. The extent to which such limitation is necessary is to be finally determined by national constitutional authorities (such as the Supreme

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[86] *Brunner*, particularly paras. 54-55 of the judgment.

[87] Weiler and Haltern, "The Autonomy of the Community Legal Order - Through the Looking Glass", p.455.

[88] *Ibid.*, p.445.

Court [of Ireland] or the Conseil Constitutionnel) in accordance with the essential commitments of the national legal order, not by the Court of Justice".[90]

Schilling takes a similar line, arguing that a Member State always has a residual right to 'autointerpretation', and that the individual supreme courts of the Member States, acting separately, have the final say on the competences of the EC.

Neither MacCormick, in discussing Phelan's suggestion, nor Weiler and Haltern, discussing Schilling's, accept this approach. Weiler and Haltern retort that a "pragmatic nightmare" would ensue if it were adopted.[91] If one State, for example, in the face of an unfavourable judicial decision from a Community court, were to unilaterally abrogate a Treaty provision, the international law principle of reciprocity would mean that the particular obligation would cease to be binding between that State and all the other parties. If combined with abrogations by other States in respect of the same or other provisions, the permutations would be cripplingly complex.[92]

MacCormick's objection to Phelan's solution brings us conveniently back to Kelsen, for it is based upon a theoretical modelling of the situation. MacCormick phrases the problem in terms of boundaries: "[t]he question is one about how to settle boundaries between interacting systems on the assumption of non-hierarchical ranking between them".[93] He argues that in response to this

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[89] The Court claims that it would have the last word on the validity of Community legislation that conflicts with German constitutional provisions: *Brunner*, paras. 49 and 99 of the judgment.

[90] Phelan, *Revolt or Revolution: The Constitutional Boundaries of the European Community*, p.417.

[91] Weiler and Haltern, "The Autonomy of the Community Legal Order - Through the Looking Glass", p.434.

[92] *Ibid.*

[93] MacCormick, "Constitutional Pluralism in the European Union: Are Collisions Avoidable?", p.10.

question, "there seem to be only two reasonably arguable analyses of the situation that obtains among the states and the Community and Union", models which he calls respectively 'radical pluralism' and 'pluralism under international law'.[94] He responds to the question of the difference between them as follows:

> "The answer depends on the relationship between the Community systems and international law...According to pluralism under international law, the obligations of international law set conditions upon the validity of state and of Community constitutions and interpretations thereof, and hence impose a framework on the interactive but not hierarchical relations between systems. According to radical pluralism, these obligations simply give a third perspective on the relationships in question, a further non-hierarchical interacting system".[95]

'Radical pluralism' corresponds to the Hartian position he defended in his earlier work. 'Pluralism under international law', by contrast, is "a kind of monism in Kelsen's sense",[96] and would correspond to the seventh of the nine Kelsenian models presented earlier in this chapter.

MacCormick originally preferred radical pluralism over a Kelsenian model on the grounds that on a pluralistic conception of relations among legal systems, "from the internal point of view of each legal system, its ultimate grounds of validity are in principle distinct from those of every other; but there can in fact be intimate interaction between systems".[97] This "factual" intimate interaction can, however, only continue up to a certain point, since under radical pluralism each system's receptability to others will eventually reach a stopping-point at

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[94] *Ibid.*, p.13.

[95] *Ibid.*, p.14.

[96] *Ibid.*, p.16.

[97] MacCormick, "Liberalism, Nationalism and the Post-sovereign State", p.149.

which challenges to the system's fundamental grounds of authority will be repulsed.

It follows from radical pluralism that in this situation courts of one legal system will be committed to denying the authority of a court of another. Although this is "not logically embarrassing, because strictly the answers are from the point of view of different systems", it is "practically embarrassing to the extent that the same human beings or corporations are said to have and not have a certain right".[98] Radical pluralism thus has its limits: "acceptance of a radically pluralistic conception of legal systems entails acknowledging that not all legal problems can be solved legally".[99] Thus Phelan's proposal would, under radical pluralism, be tempting, since "it would therefore be of value for all participants" to make explicit that "neither can or should claim all-purpose supremacy over the other".[100]

Radical pluralism is open to the criticisms noted earlier in this chapter applicable to any model built upon Hart's concept of law. A Hartian will immediately find himself in difficulties once faced with the problem of conflicting norms in overlapping systems.[101] Further, the Hartian emphasis, at the final reckoning, on the division and separation between legal systems is misplaced and misleading in the new world of intimate interaction between them. Whether by cross-fertilisation, adoption, or explicitly direct effect of norms of one legal order in another, no legal system, whether of a Member State of the European Union, or the Community itself, is now so isolated. As MacCormick writes, "pluralism

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98 MacCormick, "Constitutional Pluralism in the European Union: Are Collisions Avoidable?", p.15.

99 MacCormick, *ibid.*, and see also "The Maastricht-Urteil: Sovereignty Now", p.265.

100 MacCormick, "Constitutional Pluralism in the European Union: Are Collisions Avoidable?", p.15.

101 As Schilling notes, the weakness of the Hartian approach "lies in its appeal to a reasonable interpretation" of conflicting laws ("The Autonomy of the Community Legal Order - An Analysis of Possible Foundations", p.399).

under international law suggests that we need not run out of law (and into politics) quite as fast as suggested by radical pluralism".[102]

In his latest work, MacCormick in fact changes his position from that of radical pluralism to the thesis of pluralism under international law.[103] MacCormick argues that radical pluralism ignores the decisive role that could and should be given to (public) international law:

> "The potential conflicts and collisions of systems that can in principle occur as between Community and member-states do not occur in a legal vacuum, but in a space to which international law is not only relevant but indeed decisively so given the origin of the Community in Treaties..., to say nothing of the fact that in respect of their Community membership and otherwise the states owe each other obligations under international law. A part of the legal considerations that ought to bear upon the deliberations of both state courts and the ECJ is regard for these mutual obligations".[104]

Therefore Phelan's suggestion is therefore unacceptable, since for national courts to have "an unreviewable power to determine the range of domestic constitutional absolutes" that limit the scope of EC law within the Member State legal systems is to "invite a slow fragmentation of Community law".[105]

MacCormick objects further that Phelan's solution to the revolt or revolution dilemma is much too strong, in that it gives an "unsatisfactorily unbounded discretion to state courts".[106] He suggests that it should be qualified to the extent that any determination by the national constitutional authorities of the

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[102] MacCormick, "Constitutional Pluralism in the European Union: Are Collisions Avoidable?", p.15.

[103] This shift takes place in "Constitutional Pluralism in the European Union: Are Collisions Avoidable?" and is confirmed in chapter 7 of *Questioning Sovereignty*.

[104] *Ibid.*, pp.15-16.

[105] *Ibid.*, p.16.

[106] *Ibid.*

limits of EC law within the domestic legal order should be "in accordance with international obligations to other member states and in accordance with essential commitments of the national legal order including the commitment to good faith observance of international obligations".[107] An amendment such as this would have two effects. Firstly, it "signals...that state Courts have no right to assume an absolute superiority of state constitution over international good order, including the European dimension of that good order".[108] Secondly, it "would help to diminish the risk of normative collisions, but in the event of an apparently irresoluble conflict arising between one or more national courts and the ECJ, there would always on this thesis be a possibility of recourse to international arbitration or adjudication to resolve the matter".[109] Collisions thus are not inevitable, he concludes, although they are quite likely. Under the approach of pluralism under international law that he suggests, however, "they are not incurable in the event that they do occur".[110]

MacCormick is right in saying that collisions are not inevitable, not just because of the mediating role of international law but also because the question of fundamental authority within our national legal orders has changed beyond recognition - we are, to appropriate yet again a phrase of MacCormick's - beyond the sovereign State. The debate over the type of theoretical model we might use to characterise the relationship between the Member States, the Community and the international legal orders is only the first step towards entering the forum where the real question awaits: is the authority of the law within the Union (both of the Community and Member States) and the authority of the people who make it *justified* authority?

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107 *Ibid.*

108 *Ibid.*

109 *Ibid.*

110 *Ibid.*

The conception of all-powerful, sovereign state was born during an age of crisis, an age in which writers such as Hobbes and Bodin were concerned about the possible fragmentation of the state from the turmoil arising from religious discord, civil unrest and external threat.[111] The adoption of the concept of sovereignty and of forms of highly centralised authority was a response to this threat. The position of the nation States of the European Community is now entirely different, however: instead of reacting reflexively to centrifugal forces, they are engaged in a project of construction which aims to create a community of peace and prosperity and which is geared towards harnessing the benefits of global changes. Within it the Member States have *introduced* centrifugal forces: the challenge lies in maintaining fragmented authority in suspension, without dissolving the ties of loyalty which still bind the co-ordinating communities together. The key to this project is not integration but co-operation.

Given this need, it is in all the parties' interests to preserve the indeterminacy regarding the 'ultimate' authority within the Community and the Member States, in order to enable each to latch on to the model of legal authority that is politically most comfortable and easily sustainable. That is why collisions are not inevitable: even if, as MacCormick wonders, the diffusion of power we have come to know in the Community is "just the phenomenon of a passing moment",[112] for the moment a showdown would be potentially destructive for all involved. Sovereignty used to be "a source of certainty, and hence a source of peace".[113] As long as we can peacefully accommodate uncertainty, we can remain beyond sovereignty.

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[111] See Craig, "Public Law, Sovereignty and Citizenship", pp.317-319, where he discusses the challenge to the traditional doctrine of sovereignty made in Britain at the beginning of the century by the 'pluralists' - writers such as H.J. Laski, E.Barker and A.D. Lindsay. See also Koopmans, who argues that we are "approaching an age of new legal pluralism..." (Koopmans, "Sources of Law: The New Pluralism", p.191).

[112] MacCormick, "Beyond the Sovereign State", p.17.

[113] *Ibid.*, p.15.

3.8 Justifying sovereignty

How does 'pluralism under international law' and the general Kelsenian approach discussed earlier fit into the central debate about the justification of authority within the Community? Although it is true that what matters in the end is who has power, and how they exercise it, in the Community our conceptual picture of that power takes on an inflated role, since the preservation of the 'identity crisis' magnifies the importance of competing personal views of the seat of power and authority within it. The link between the Kelsenian models and the justification of authority lies in a recognition of the fact that whichever theory, model, concept we come to hold, "[w]e *choose* this interpretation, hoping to have recognized the beginning of a development of the future and with the intention of strengthening as far as possible all the elements...which tend to justify this interpretation and to promote the evolution we desire".[114]

The application of Kelsen's theory of validity to the Community aimed to show that there are various theoretical models we can use as tools to understand the authority and autonomy of the Community. It is the *choice* of tool that must be justified. Kelsen warns that "in social and especially in legal science, there is still no influence to counteract the overwhelming interest that those residing in power, as well as those craving for power, have in a theory pleasing to their wishes".[115] The nine different theories of authority we identified show that, for example, the view of the world which places the sovereignty of one's own State is not inevitable.

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[114] Hans Kelsen, *Law and Peace in International Relations: The Oliver Wendell Holmes Lectures*, (1942), p.54-55, quoted in David Kennedy, "A Case Study of Legal Architecture: The Hans Kelsen of the Oliver Wendell Holmes Lectures: Public International Law Pragmatist", p.49.

[115] GTLS, *Preface*, p.xvii.

We may do well to note Craig's reminder that the core of the British theory of sovereignty proposed by A.V. Dicey - widely cited as a source of the 'orthodox' view - is a normative argument constructed to justify the parliamentary sovereignty he empirically describes.[116] Craig claims that the Diceyan argument "is based on the realization that there must be some principled justification for the existence of parliamentary sovereignty",[117] the essence of the justification he eventually proposed being that "a Parliament...represented the most authoritative expression of the will of the nation".[118] Sovereign power is only legitimate if reasons for it can be found in arguments which are defensible in terms of normative principle - which, Craig argues, "opens the way for a modification of traditional ideas on sovereignty if no convincing normative justification can be found in the present day".[119]

From this perspective, Kelsen takes us to the threshold of the debate on authority, but does not enter it. For Kelsen, elaborating his pure theory of law, sovereignty is reduced to the hypotheses and presuppositions of legal science. Yet this ignores the ties of identity and loyalty that are inherent to the concept of sovereignty (particularly understood as justified authority), even though he himself tells us that the adoption of one model amongst those presented by the pure theory is a matter of choice and justification, not just cognition. Kelsen abdicates from analysis of this further step, detaching himself from the questions that arise in and from the making of this choice. Kelsen's aim is to unveil reality, not to engage with it - a project valid in itself but which offers little guidance to people who must grapple with the law.

Those people include judges, who are of central importance in reflections upon authority because they do not only work with the authoritative standards of

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[116] Craig, "Public Law, Sovereignty and Citizenship", p.319.

[117] *Ibid.*, p.320.

[118] *Ibid.*, p.319.

[119] *Ibid.*, p.308.

which the law consists, but also claim to offer authoritative decisions regarding the law. Kelsen's theory, notwithstanding its invocation as grounds for their decisions by the courts embroiled in the revolutions in Pakistan, Uganda and Rhodesia forty years ago, can have no application to the role of the judge. These courts argued that Kelsen's theory licensed them to accept the legality of the successful revolutions occurring in their respective countries, and that in doing so they were not entering the political arena.[120] Yet Kelsen's theory was misappropriated here: being purely descriptive it licenses no such decision.

In reflecting on the authority of Community law we must leave Kelsen behind and turn to theorists who offer us insights into the nature of the committed, normative point of view. Weiler and Haltern suggest that the effects of the German Federal Constitutional Court's decision in *Brunner* are not necessarily 'unhealthy': "The German move is an insistence on a more polycentred view of constitutional adjudication and will eventually force a more even conversation between the European Court and its national constitutional counterparts".[121] It could be that collisions between the legal orders become, in the courts of the Member States and the Community, a catalyst for greater attention to the legitimacy of the network of power within the Union, and greater awareness of and sensitivity to the *political* interests upon which the different understandings of *legal* authority rest. The next chapter will consider the relationship between political and legal authority in more detail.

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[120] See Harris, "When and Why does the Grundnorm Change?", p.104.

[121] Weiler and Haltern, "The Autonomy of the Community Legal Order - Through the Looking Glass", p.446.

Chapter Four

The Critic

Introduction

In order to consider the authority of European Union law it is necessary to step both forward and back: forward, to adopt the committed normative perspective, and back, to widen our vision to encompass the European Union. After exploring the relationship between authority and legitimacy, I introduce the committed point of view of Ronald Dworkin and ask how our political practices within the Union underpin the authority and legitimacy of the law that those practices produce. However, this question leads us back once more to the issue of perspectives, and to the relationship between the object being studied and the subject studying it. This time I look at the perspective of the critic - and how we can look at perspectives critically.

4.1 Authority and legitimacy in the European Union

4.1.1 What is legitimacy?

The basis of political legitimacy with which we are most familiar in the West is democracy - the justification of political authority according to the principle that coercive power must be the 'power of the people', the people being the 'authors' of the laws which govern them. Democracy is seen as an answer to the question why the state may legitimately exercise coercive power over its subjects. Yet the concept of democracy is understood in a myriad of different ways, the variety and extent of which becomes immediately clear on any reading of the literature discussing legitimacy in the European Union.

Harlow notes that after Maastricht, the political mood in Europe changed sharply:

> "Where once issues of sovereignty and separation of powers had dominated the agenda, legitimacy had now become the staple fare of public law debate and arguments for transparency and accountability were increasingly heard".[1]

Following this change, legitimacy was a central concern of the debates that took place as part of the 1996 Intergovernmental Conference (IGC). According to De Burca's analysis, the IGC debates report that the legitimacy of the Union rests on four particular 'themes': European citizenship, as a means of identification with the Union as a legitimate polity; democracy, in that enhancement of the democratic nature of the institutional structures and processes of the Union is necessary if members of the public are to feel that they can participate in processes affecting them; subsidiarity, by which is meant that

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[1] Harlow, in Craig and Harlow (eds.), *Lawmaking in the EU*, p.xviii.

decision-making should only take place at the European level if that is the most appropriate and effective means; and lastly, the transparency and openness of procedures, which should be improved in order that the public are informed about and can scrutinise the Union's political and decision-making processes.

Yet the concept of legitimacy is a complex one, and we cannot safely assume the Union will be 'a legitimate polity' so long as it enhances citizenship, democracy, subsidiarity and transparency. For some, the legitimacy of the Union is inconceivable without the protection of human rights and individual liberties[2] or the "constitutional traditions" of the Member States;[3] for others the core of legitimation is the provision of fora for political deliberation and argumentation.[4] The gap between concepts of legitimacy leads to a debate conducted at cross-purposes: this can be seen in the fact, for example, that while some parties are calling for a European Constitution and a written EC Bill of Rights,[5] others doubt even that the EU enjoys or can enjoy any democratic legitimacy while no common European language or media exist.[6]

There will always be disagreement about the conditions under which political power and the laws it creates will be legitimate. In Chapter Six I consider more fully the question of legitimacy in the Union. In this section, however, I want to make an initial clarification of the question itself. 'Legitimacy' goes to the heart of the relationship between law and politics. The product of political power wielded in a way which claims legitimacy is law.[7] Yet what is at stake

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[2] See, e.g., Hauser and Müller, "Legitimacy: The Missing Link for Explaining EU Institution Building", p.25.

[3] Petersmann, "Constitutionalism, Constitutional Law and European Integration", p.256.

[4] See, e.g., Gerstenberg, "Law's Polyarchy: A Comment on Cohen and Sabel", pp.350-351.

[5] Petersmann, "Constitutionalism, Constitutional Law and European Integration", pp.260-261.

[6] Mestmäcker, "On the Legitimacy of European Law", pp.628-629.

[7] Behind this short phrase lie many scholarly works, a great number of which would disagree with the connection suggested here. I am drawing on Raz, who argues persuasively, to my mind, that a political authority does not only exercise coercion but claims to be legitimate in

here is not the justification of politics, or law, as such, but the justification of their *claim to authority*.[8] What must be justified is the claim that the Union law-makers and the law they make should be obeyed.

In order to understand legitimacy, then, we must understand authority, for legitimacy is simply justified authority. Both 'authority' and 'justified' can bear various meanings. There are, for example, various forms of authority. Weber, famously, distinguishes what he terms charismatic authority from traditional authority and the authority of natural law.[9] Raz demonstrates further that authority is understood in various ways.[10] Having authority may mean having permission to do something which is normally forbidden - to have authority to read mail addressed to my boss, for example. Someone may, on the other hand, have authority to the extent that he is an expert with specialised knowledge and experience. Both of these types of authority are different from the political authority we see in the European Community (and every Member State), which might be initially described as a having the right to rule.

Authority can and has been approached from many different angles and with different objectives in mind. Weber's approach is, obviously, primarily sociological, exploring the conditions and causes of the emergence and development of authority. The perspective from which authority is here approached, however, is predominantly normative: it asks whether the authority of the EU lawmakers can be justified. This question is fundamental because, as our assumption in the West that democracy must play a part in the authority of

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doing so: an essential feature of law is thus that it claims legitimate authority (Raz, *The Authority of Law*, pp.29-30; Raz, "Authority, Law and Morality", p.296). Raz's arguments are discussed in Chapters Five and Six, infra.

[8] Anscombe gives probably the pithiest definition of political authority: to have authority is to have "a regular right to be obeyed in a domain of decision" ("On the Source of the Authority of the State", p.144).

[9] Weber, *Economy and Society: An Outline of Interepretive Sociology*. See also the discussion of Weber's concept of authority in Finnis, "On Positivism and Legal Rational Authority".

[10] See Raz, *Authority*, pp.2-3.

our political and legal practices shows, we do not accept that naked power necessarily has authority. While we accept the idea that a controlling group of gangsters may wield political power in a certain territory, we instinctively reject the notion that they have authority to do so. An authority must make some claim to legitimacy: it has the right to rule.[11]

Discussing authority in the context of the European Union, an extra qualification must be added to our starting point. The way in which authority is exercised has a bearing upon, but must not be confused with, the way in which authority may be justified. Debate over competing theories of governance in the EU, such as those of Moravscik (intergovernmentalism)[12] and Weiler (supranationalism)[13] relates to theories which are descriptive and analytical, not normative. The way in which power is exercised in the EU clearly does make a difference to the factors which might justify it, but the descriptive and normative questions must be separated.

4.1.2 Legitimacy as justified authority: three distinctions

Legitimacy - justified authority - can be understood in different ways. In the European debate, Weiler breaks down the concept of legitimacy into formal and social legitimacy. He defines formal legitimacy as follows: although, he argues, any notion of legitimacy must rest on some democratic foundation

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[11] Raz, in his introduction to *Authority*, terms this understanding of authority as the starting point for its normative justification: "All the writers represented in this volume agree that neither brute force by itself nor any amount of influence or power are sufficient to constitute any person or body as an authority" (p.3). Anscombe, in her analysis of the authority of the State, makes a further distinction on this particular point: she argues that in order to understand authority we need to distinguish government exercising it from "two contrasting things: on the one side, from large-scale voluntary cooperative associations, and on the other from a place's being quite under the control of a smooth sophisticated Mafia" ("On the Source of the Authority of the State", p.143).

[12] See, e.g., Moravscik, "Preferences and Power in the EC: A Liberal Intergovernmentalist Approach".

[13] See, e.g., Weiler, "The Transformation of Europe" and "The Dual Character of Supranationalism".

(which he refers to as the people's consent to the polity's power structures and processes), we can still speak of formal legitimacy "if we can show that the power structure was created following democratic processes and with the people's consent".[14] Formal legitimacy is, he argues, to be distinguished from social legitimacy, which "connotes a broad societal acceptance (empirically determined) of the system".[15] It does, however, contain "an additional substantive component: Legitimacy is achieved when the government process displays a commitment to, and actively guarantees values that are part of, the general political culture - such as justice and freedom".[16]

I have set out Weiler's arguments here because he has taken probably the most thoughtful approach to the concept of legitimacy in the EU. I find his breakdown of the different branches of legitimacy confusing, however. I would prefer to set out three different types of legitimacy, which I will term respectively the social, legal and normative justification of authority. Firstly, a political system may be argued to be legitimate if it enjoys some level of social acceptance, just as Weiler says. This type of legitimacy mirrors what Kelsen calls the efficacy (as opposed to the normativity) of law. Secondly, legitimation through a legal justification of authority corresponds loosely to Weiler's 'formal' legitimacy, but in the terms of this thesis shall be more specifically defined as the Kelsenian view of authority: law is legitimate if it can be subsumed under another legal norm or, alternatively, under the *Grundnorm*.

The third type of legitimacy, authority which is justified normatively, relates to the 'component' that Weiler adds to social legitimacy. It should stand independently from social and legal legitimacy, however, because it is a contested question whether political authority must have real power in order to qualify as an authority; in other words, whether an authority may be

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[14] Weiler, "After Maastricht: Community Legitimacy in Post-1992 Europe", p.19.

[15] *Ibid.*

[16] *Ibid.*, p.20.

normatively justified while lacking the social and possibly legal acceptance that confers social and legal authority. Weiler himself shows why it is important neutrally to identify the normative justification of authority: his suggestion that authority will be justified when the process of government guarantees values that are part of the general political culture is only one criterion among many highly controversial criteria.

I have separated out these three branches of legitimacy because the fulfilment of all three types is not required in order for it to be possible to argue that a political and legal system has justified authority. One obvious example is that of revolution, where a new political authority no longer has legal justification but is sustained by a level of social support sufficient to claim legitimacy nevertheless. What both legal and social justification for authority have in common, however, is that when either are in doubt, they shall and must turn to the normative question of legitimacy.

It is clear that great attention is given to the legal justification of the authority both of Community and Member State decision-makers within the Union. Sophisticated procedures of judicial review safeguard legal legitimacy within both Member States and Union. Justification of Union authority through a certain level of social acceptance is, however, more problematic. De Burca, for example, points to the substantial level of public opposition to the EU manifested in the public debate surrounding the Maastricht Treaty: she is correct to say that if the power of the Community institutions is seriously challenged and their purpose questioned, the legitimacy (at least, the *social* legitimacy) of the Community system is seriously undermined.[17]

Gibson and Caldeira, in a similar vein, suggest that the legitimacy of one particular Community institution, the European Court of Justice, is low. They claim that they "have good reason to doubt the extent and depth of the

[17] See De Búrca, "The Quest for Legitimacy in the European Union", p.351.

legitimacy of the [ECJ]...[It] confronts important problems of support, legitimacy, and ultimately of compliance".[18] They base this conclusion upon a survey conducted through Eurobarometer (the semi-annual survey of public opinion within Europe, under the aegis of the European Commission) in each of the Member States, which showed, they argue, that "a large proportion of ordinary Europeans is unwilling to continue supporting the institution if it makes unpopular decisions".[19]

However, the usefulness of Gibson and Caldeira's conclusion, that the legitimacy of the ECJ is challenged by these findings, is severely curtailed by the fact that they take such an emaciated concept of legitimacy. Gibson and Caldeira ignore the different types and elements of legitimacy identified above. Their criterion, that the legitimacy of the European Court of Justice rests solely upon "how the mass public views, evaluates and supports the [Court]"[20] is misleadingly simplistic. The Court of Justice is, in fact, a prime example of the complex interplay between social, legal and normative authority which fuses to constitute a court's (or a ruler's, or a government's) legitimacy. Crude measurements of public 'support' ignore, for one, the duty of any court to uphold the law rather than popular opinion, particularly where, in the constitutional democracies that largely make up the European Union, the law will not infrequently protect the minority against the majority.

Furthermore, plain majorities are not decisive in according or withholding legitimacy: the present day abounds with examples of political authorities which are socially legitimised not through a 'broad societal acceptance' but by the strength and power of key figures and groups within society. The audience is crucial. This is particularly true in the case of courts, which address their judgments primarily to an audience of lawyers, an audience which has infinitely

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[18] Gibson and Caldeira, "The European Court of Justice: A Question of Legitimacy", p.205.

[19] *Ibid.*, p.221.

[20] *Ibid.*, p.205.

more power than the 'mass public' to 'evaluate and support' a court and thus to confer or withdraw social legitimacy upon or from it. Since authority is effective only if enough powerful people regard the ruling body as having justified, normative authority, an analysis of social legitimacy will also involve an analysis of normative legitimacy.[21]

By distinguishing the particular audience that an authority will primarily court for legitimacy, we see also the role that normative justification of authority plays in both legal and social legitimacy. Both legal and social legitimacy depend, at root, not only upon the formal authority bestowed by compliance with legal norms and the demands of brute power, but also upon inescapable normative criteria; criteria regarding the nature of the democracy we believe to be correct, regarding the balance between competing interests of the public and the individual, regarding the type of society within which we wish to live. It is the issue of normative legitimacy that will therefore be explored in the following chapters.

In the European Union, social legitimacy will, to state the obvious, depend on offering both a normative picture of legitimate authority that elites and 'mass publics' will find acceptable, and then showing that the political and legal practices within the Union match or at least aspire to that ideal. Weiler, for example, explicitly considers ways in which to contribute to the social legitimacy of the Union. He suggests that popular support would be increased by taking the following steps: firstly, to "demonstrate visibly and tangibly that the total welfare of the citizenry is enhanced by integration"; secondly, "to ensure that the new, integrated polity will have democratic structures"; and thirdly, "to give, for a time at least, an enhanced voice to the separate polities".[22]

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[21] See Raz, *The Authority of Law*, pp.29-30.

[22] Weiler, "After Maastricht: Community Legitimacy in Post-1992 Europe", p.22.

A normative picture of political authority in the EU as being legitimate if it contains the elements of welfare enhancement, democratic structures and consultation of Member State authorities is clearly a good sketch from which to start. Yet a sketch only goes so far: what form are those "democratic structures" going to take, for example? And how far should an interpretation of the political and legal practices that constitute a normative picture of legitimate authority be affected by the likelihood of its social acceptance? De Burca points out that in her reading of some of the reports made in the context of the 1996 IGC she finds it unclear whether the official participants in the reform process "genuinely believe that the Union lacks essential legitimacy and requires fundamental reform, or whether their principal aim is to placate the public". "Is their concern", she goes on to ask, "mainly with popular legitimacy and not with the normative values underlying this loss of support?"[23]

The question that will be considered in this and the following chapters is that of the form that a normative justification for the political and legal authority of the European Union might take. In order to do this, however, yet more steps backward must be taken in order to widen our perspective and give the fullest picture possible of all the elements of normative authority. Looking carefully at legitimacy also entails examining the way in which we look. The next move will therefore be to introduce Ronald Dworkin's theory of political legitimacy, which incorporates not only a normative analysis of justifiable political and legal practice but also an analysis of "how we look" - a theory of interpretation of social practices.

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[23] De Búrca, "The Quest for Legitimacy in the European Union", p.372.

4.2 Dworkinian legitimacy: political integrity and constructive interpretation

The reference to 'Dworkinian legitimacy' may seem initially obscure, since if any slogans are used in relation to Dworkin's work, those of "law as integrity" and "law as interpretation" are the most common. However, *Law's Empire*, the book that contains Dworkin's most elaborated version of legal interpretation, is concerned also with legitimacy. After all, the questions that he claims to tackle within it - what is the law, how do and how should judges identify it - are all questions that go to the correctness, and thus the legitimacy, of the authority of the law and the authority of the judges that apply the law.

Dworkin's work will provide the framework for the following chapters of this thesis. In this section, however, I introduce Dworkin's views on constructive interpretation and his concept of integrity. This is necessary in order to go on to consider the claim which is central to Dworkin's theories both of legitimate interpretation of law and legitimate interpretation of politics: that only a community which accepts the political principle of integrity can claim genuine authority and legitimacy.[24] I then take a look at the first stage in Dworkin's two-stage test of interpretation: that of fit. I ask whether integrity fits the practices of the European Union; I conclude that it does not.

4.2.1 Integrity and interpretation

Although Dworkin's theory is usually termed "*law* as integrity", it does in fact contain both legal and political elements. It is true that Dworkin's work on integrity is built up in response to the task of developing a "program of adjudication" that can be recommended to judges and used to criticise what they do. However, Dworkin's legal principle of integrity cannot be separated from the political principle of integrity. Law as integrity presupposes a

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[24] LE, p.214.

commitment to integrity in the political community to which the law belongs. The political community must accept integrity as a distinct political virtue in order that its judges may legitimately use Dworkin's programme of law as integrity in adjudication.

Dworkin argues that the way a judge interprets the law (and his beliefs as to what interpreting the law mean) are rooted in, but also create, a particular *political* conception of his community. The political principle of integrity, in its most innocuous and innocent form, asks lawmakers to try to make the total set of laws morally coherent.[25] Yet this modest demand conceals a model of political legitimacy, obligation, community and membership which has repercussions even on the conception of democracy we wish our community to embrace.

Dworkin's theory depends on his thesis that social practices, such as courtesy, or law, or politics, are *interpretive concepts*. This thesis is based on a detailed argument which I will not reproduce here;[26] I simply want to set out Dworkin's basic contentions in order to describe how in attempting to understand the politics of any community, including the European Union, we are engaged in interpretation. This interpretation, further, is of a particular type: what Dworkin terms *constructive interpretation*.

When we interpret a social practice such as a community's law or politics we aim, according to Dworkin, to interpret something created by people as an entity distinct from them, rather that what people say (conversational interpretation) or events not created by people (scientific interpretation).[27] Constructive interpretation is, roughly, "a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form

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[25] LE, p.176.

[26] See LE, chs. 1 and 2.

[27] LE, p.50.

or genre of which it is taken to belong".[28] Dworkin takes care to underline that a person who seeks to interpret a social practice does not ask what people think about it: to do so would simply be to reproduce the interpretations of the practice that those people have already made. Instead he must "*join* the practice he proposes to understand"; his conclusions are then "claims...*competitive* with theirs".[29]

Interpretive claims are to be measured along two dimensions, which Dworkin calls the dimension of 'fit' and the dimension of 'justification'. A constructive interpretation of a social practice should fit that practice, and it should provide a sound justification for it.[30] The dimension of fit is a rough threshold requirement that an interpretation must meet if it is to be at all credible.[31] Any interpretation of the law of the European Union that denied the possibility of private ownership, for example, would fail the test of fit and would be disqualified outright. The political test of fit is derived from the bulk of political practice and the political history of the community.[32] Different interpreters might set this threshold differently, but if a person's test of fit is subject to and adjustable to her personal convictions then she is not in good faith interpreting the practice at all.

If an interpretation passes the initial test of fit, the test of justification comes into play. The interpreter must choose between eligible interpretations "by asking which shows the community's structure of institutions and decisions - its public standards as a whole - in a better light from the standpoint of political morality".[33] It is at this stage that personal beliefs come into play: the

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[28] LE, p.52.

[29] LE, p.64.

[30] See LE, p.139.

[31] See LE, p.255.

[32] *Ibid.*

[33] LE, p.256.

interpreter's "own moral and political convictions are now directly engaged".[34] The test of justification is an examination of an interpretation's substantive appeal, although the formal and structural constraints that dominate on the first dimension figure on the second as well, for one interpretation may show the practice in a better light because it fits more of its history, for example.[35]

4.2.2 Community personified

If we wish to argue that the European Union should be interpreted as accepting the principle of integrity, however, we must simultaneously defend the argument that the Union itself is a distinct moral agent. Otherwise it becomes impossible to refute the objection that the Union cannot be "committed to" integrity as a principle, or compromise "its" principles in accepting checkerboard provisions, since the Union is not an entity that can have principles to compromise. It is inconsistency in principle among the acts of the Union *personified* that integrity condemns, and this supposes that the Union as a whole can be committed to principles of fairness or justice "in some way analogous to the way particular people can be committed to convictions or ideals or projects".[36]

How can a community be committed to particular principles in the way that a person can? Dworkin's theory demands a particularly deep personification of the political community, in that it assumes that a political community can be some "special kind of entity distinct from the actual people who are its citizens".[37] He argues that the opposing view, that a state and its government are merely collections of people, fails to account for our practice of sometimes according responsibility collectively, not just individually, and contradicts the way in

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[34] *Ibid.*

[35] LE, p.231.

[36] LE, p.167.

[37] LE, p.168.

which we require special standards of behaviour from officials who act in the name of a group to which we all belong.[38]

The acceptance of the legislative principle of integrity by a community and the personification of that community are interdependent, in that personification is an aspect of political integrity, and vice versa.[39] Thus Dworkin's argument is not that integrity is a special virtue of politics because the state or community is a distinct entity, but that "the community should be seen as a distinct moral agent because the social and intellectual practices that treat community in this way should be protected".[40] We must ask whether we do well to interpret the Union as a distinct moral agent which recognises integrity as a legislative principle.

4.2.3 Political integrity in the European Union: the dimension of fit

What this section aims to do is to examine, in relation to the European Union, Dworkin's preferred interpretation of political practices. He argues that we should interpret our political life as accepting the principle of integrity. Integrity becomes a political ideal "when we insist that the state act on a single, coherent set of principles even when its citizens are divided about what the right principles of justice and fairness really are".[41] It is thus to be distinguished from fairness in politics, which "is a matter of finding political procedures - methods of electing officials and making their decisions responsive to the electorate - that distribute political power in the right way",[42] and justice, which "is concerned

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[38] Dworkin specifically discusses personification of a community in LE, pp.167-175 and pp.186-188.

[39] LE, p.167.

[40] LE, p.188.

[41] LE, p.166.

[42] LE, p.164.

with the decisions that the standing political institutions, whether or not they have been chosen fairly, ought to make".[43]

Dworkin develops his concept of integrity through an analysis of the obligations people hold in relation to each other and themselves within particular political communities. The stages of his argument will arise in more detail in the next chapter; suffice it to say, he concludes that best defence of political legitimacy ("the right of a political community to treat its members as having obligations in virtue of collective community decisions")[44] is to be found in the concept of integrity: only a community which accepts integrity (which then falls within his category of a 'community of principle') can claim genuine authority and legitimacy.[45] Does, then, the European Union accept integrity? Following Dworkin's test, this must be answered by looking at fit and at justification.[46]

Does integrity fit the political practices of the European Union? Evidence that the Union does accept integrity as a distinct political virtue would be the general rejection of what Dworkin calls "checkerboard" laws. By this he means laws that are internally compromised, in the sense that principles must be appealed to in order to justify one part of the law that are incompatible with another. For example, if the people of Alabama disagree about the morality of racial discrimination, their legislature could forbid discrimination on buses but allow it in restaurants. Checkerboard laws treat a community's public order as a kind of commodity, "a cake to be distributed fairly by assigning each group a proper slice".[47]

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[43] LE, p.165.

[44] LE, p.206.

[45] LE, p.214. Dworkin's argument here, and the three types of community he identifies, are considered more fully in Chapter Six, infra.

[46] Justification for integrity in the EU is examined in Chapter Six.

[47] LE, p.179.

At first sight it would seem that the Union rejects such checkerboard laws: it prefers to compromise about which scheme of justice to adopt, rather than adopting a compromised scheme of justice. If the decision-makers had disagreed about the extent to which women should be paid the same as men for equal work, they would not have adopted a scheme which allocated protection according to the strength of the different viewpoints, such as deciding to protect them against discrimination if they worked for a bank but not if they worked for a retailer. The Union is also committed to the principle of equality, which comes hand-in-hand with integrity: a general principle of equality of treatment supplants the various provisions to be found in the Treaties. On the bulk of the Union's political practice, it seems to accept integrity as a political principle.[48]

4.2.3.1 Flexibility

However, in the last few years a concept has been introduced into Union politics which, in its stronger forms, appears to be incompatible with integrity. This concept is 'differentiation', or 'flexibility'; more euphemistically it has also been re-named 'closer co-operation'. It has existed and been discussed in the Community and Union context for several years. In the early debates the meaning of differentiation and the terminology used to describe the varying meanings differed widely. Stubb distinguishes three main subcategories: (i) 'multi-speed'; (ii) 'variable geometry'; and (iii) 'à la carte'.[49] Originally differentiation was taken to mean 'multi-speed': an approach which allowed certain Member States to advance faster than others toward some particular integrative goal. Multi-speed integration in its classic sense has particular characteristics: the integration process is based on policy objectives agreed by all

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[48] It is no obstacle to the commitment of the EU to integrity that there may be differences among the Member States, even over matters of principle. Integrity holds within political communities, not among them, so the scope of the requirement of integrity is restricted only to the decision-makers of the Union in their Union roles, no further (see Dworkin, LE, pp.185-186).

[49] Stubb, "A Categorization of Differentiated Integration".

the Member States; it is accepted that all the Member States will eventually reach these objectives; it is only the speed at which the process takes place which is differentiated, and so the differentiation is therefore temporary. Curtin also adds that multi-speed differentiation must be capable of "objective justification", by which she means justification by social and economic factors as opposed to political reasons.[50]

It is clear that recourse within the Union to a legislative principle of multi-speed differentiation by no means flouts the principle of integrity in the way that, for example, rules providing that only those Union workers born in even years should be subject to a maximum number of hours in their working week clearly would. Yet Dworkin's examples of checkerboard statutes are the most *dramatic* violations of the ideal of integrity, which leaves open the possibility of cases which are violations nevertheless, albeit in a small way. Differentiation will be contrary to integrity if it takes a form which entails that the Union must endorse principles to justify part of what it has done that it must reject to justify the rest.[51] In creating multi-speed legislation, however, the Union does not do this; or, at least, any inconsistency is minimised by the overarching principle of eventual convergence, which ensures that the temporary derogation from integrity is just that - temporary.

The Maastricht Treaty, however, saw an extension of differentiation which moved to the realm of 'variable geometry'. The crystallisation of the concept within the TEU took place as a response to the crippling difficulties experienced in reaching consensus among the Member States in key areas of policy. As Curtin puts it, it is "indisputable that a Union of 15 Member States whereby each individual Member States [*sic*] has the power to effectively veto the others from undertaking new or expanded activities is doomed to helpless

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[50] Curtin, "The Shaping of a European Constitution and the 1996 IGC: 'Flexibility' as a Key Paradigm?", pp.244-245.

[51] LE, p.184.

stagnation".[52] In addition, Gaja points out that certain Member States are viewed as incapable of taking part in further integration because of their political, economic or social conditions – he gives the example of Greece with regard to the adoption of the single currency.[53]

Flexibility can therefore satisfy the desire of some Member States to strengthen their ties in particular areas of policy, and release Member States from the need to proceed at the pace of the slowest (an issue which has become more pressing with the prospect of the accession of Eastern European countries to the Union). Very simply, flexibility offers an approach which solves both these problems by enabling Member States to "enjoy different classes of obligations in terms of membership commitment".[54]

Yet flexibility in the form of 'variable geometry' is not temporary and is far more difficult to reconcile with an acceptance within the Union of the legislative principle of integrity. Various examples of such a form of flexibility were to be found in the Maastricht Treaty, such as the Protocol and Agreement on Social Policy and the provisions on Economic and Monetary Union. These have particular characteristics which distinguish them from the multi-speed form of differentiation. For example, the Protocol and Agreement were the fruit of a fundamental disagreement between the UK and the other Member States which was left unresolved: in the absence of consensus the UK, opposing the objectives and aims of the other Member States in the field of social policy, 'opted-out' from the controls that the others wished to create. This opt-out was, further, unlimited: as opposed to the temporary nature of the multi-speed approach, the UK obtained the possibility of a permanent derogation from the new provisions. These characteristics are shared by similar opt-outs obtained by

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[52] Deirdre Curtin, "The Shaping of a European Constitution and the 1996 IGC: 'Flexibility' as a Key Paradigm?", p.241.

[53] Gaja, "How Flexible is Flexibility under the Amsterdam Treaty?", p.858.

[54] *Ibid.*

both the UK and Denmark in the sphere of Economic and Monetary Union, which allow them to refuse to join the transition to a common currency at the third stage of the procedure towards monetary union.

Such opt-outs suggest that the legislature is no longer speaking "with one voice", as integrity requires - in fact, the EMU opt-out provides that the derogating Member States shall no longer join in that voice, since their voting rights are thus suspended. Integrity demands that there be compromise about which scheme of justice to adopt: the variable geometry form of flexibility is incompatible with integrity since, in the absence of such compromise, it compromises the scheme which is adopted.[55] According to Ehlermann, acts adopted under the Social Policy Agreement were acts of the Community, as opposed to intergovernmental agreements between the participating Member States.[56] On this analysis, integrity would seem to have fallen by the wayside, since to exclude British Union citizens from that area of law would be incoherent in principle with the rest of the Community's constitutional scheme, which makes other rights Community-wide in scope and enforcement.[57]

However, the question whether integrity 'fits' the legislative practice of the *Union* must be distinguished from the question whether integrity fits the legislative practice of the *Community*. The Union is clearly not committed to a legislative principle of integrity - and, of course, it has no legislature as such. It is the European Council which provides the Union "with the necessary impetus for its development and shall define the general political guidelines thereof",[58] which guidelines do not have the status of Community legislation and are

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[55] See Dworkin, LE, p.179.

[56] Ehlermann, *Increased Differentiation or Stronger Uniformity*, p.14. This view is not shared by all commentators, however: Curtin shows how unclear the status of such acts would be and argues that they should be interpreted rather as intergovernmental norms ("The Constitutional Structure of the Union: A Europe of Bits and Pieces", p.57).

[57] See Dworkin, LE, p.186.

[58] TEU, Art. D.

almost entirely exempt from the jurisdiction of the Court of Justice.[59] The Union, although including the Community, is individually characterised by its "forms of co-operation"; far from "speaking with one voice", the Council operates as an intergovernmental body and, as the expansion of the concept of differentiation since the creation of the Union demonstrates, will accept division along national lines.

At the time, Ehlermann's view that acts adopted under the Social Policy Agreement were acts of the Community was not shared by all commentators. Some commentators argued that variable geometry under Maastricht was contained to the Union only and was external to the Community. Harmsen, for example, noted that their precise status is unclear,[60] while Curtin argued that the Protocol does not confer upon them the status of Community law.[61] On this interpretation, the coherence of the Community's legal order was unbreached and the commitment to integrity maintained.

However, the Treaty of Amsterdam has extended flexibility once more through the provisions it contains on 'closer co-operation'. The general mechanism is outlined in the new Title VII of the TEU (Articles 43 to 45). This is supplemented by specific provisions relating to the first pillar (in Article 11 of the EC Treaty) and to the third pillar (in Article 40 of the TEU). Philippart and Edwards comment that the TA contains three types of flexibility: "a general system of rules for any close co-operation that meets certain preconditions; predetermined flexibility, i.e., closer co-operation in particular fields with

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[59] TEU, Art. L.

[60] Robert Harmsen, "A European Union of Variable Geometry: Problems and Perspectives", p.121.

[61] Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", p.57.

special arrangements (largely via 'protocol-ization'); and case-by-case flexibility through constructive abstention and opt-outs".[62]

In particular, there are two significant changes. First, the TA has taken a variable geometry form of flexibility to the heart of the European Community legal order. Article 11 of the EC Treaty provides a mechanism by which Member States which wish to co-operate more closely between themselves may be authorised to make use of the EC Treaty's procedures and institutions in order to do so. Secondly, the TA opens the way to flexibility in areas which are undefined: as Dashwood says, the "novelty of the mechanism...is that it may be used in cases which have not been pre-determined at the level of primary Union law".[63]

Yet the new provisions do not flout the Dworkinian principle of integrity so much as might be first supposed. Firstly, a line is drawn between flexibility within and flexibility without the Community legal order. There are significant differences between the flexibility provisions relating to the first pillar – the Community - and those relating to the Union. The conditions to be fulfilled before closer co-operation can take place are more stringent under Article 11 of the EC Treaty than under Article 40 of the TEU. The procedures are also different: under Article 11 the Commission has the right of initiative, whereas the Council is the decisive actor under Article 40. The instruments and procedures after the establishment of closer co-operation are those of the respective treaty frameworks.[64] Lastly, under Article 11 both the Commission or any of the Member States through the Council is in a position to block closer co-operation. It is clear that the extent to which closer co-operation is viable

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[62] Philippart and Edwards, "The Provisions on Closer Co-operation in the Treaty of Amsterdam: the Politics of Flexibility in the European Union", p.89.

[63] Dashwood, "States in the European Union", p.210.

[64] See Monar's discussion of flexibility, particularly in relation to the third pillar, in "Justice and Home Affairs in the Treaty of Amsterdam: Reform at the Price of Fragmentation", pp.332-335.

within the Community is far more restricted than within the wider Union sphere.

In fact Jo Shaw goes so far as to argue that the TA "provides a framework for future co-operation which is likely to be too restrictive to be workable, except in very limited circumstances".[65] The attempts to restrict the impact of flexibility on the Community order show that value is still ascribed to its coherence. However, the restrictions cannot take away the fact that even within the first pillar flexibility contradicts the principle of integrity and creates a risk of fragmentation of Community law. As Gaja says, "[t]he interpretation of one provision of Community law in its normative context may well yield different results according to whether a Member State participates in closer co-operation or not".[66] Philippart and Edwards warn against viewing the system as a 'white elephant', useless and unmanageable: "even in pillar I, this assumption is debateable, given the possible pressures within, say, the single currency area or simply because of institutional logic...[T]he system now exists and a possible activation cannot be excluded".[67]

This would, according to Dworkin, be a fundamental stumbling-block for any claim of European Community law to be authoritative for the subjects of the legal system. A community which, in its political practices, does not accept and implement the principle of integrity, does not have justified authority. Yet I would suggest that Dworkin's claim here does not match our experience here with relation to the EC. It is true that the concept of flexibility is for the most part alien to our experiences within our unified, generally homogenous Member States. Yet it is *not* seen as a death blow to the legitimacy of the law of the European Union. Quite the opposite in some circles: it is viewed as a

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[65] Shaw, "The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy", p.63.

[66] Gaja, "How Flexible is Flexibility under the Amsterdam Treaty?", p.867.

[67] Philippart and Edwards, "The Provisions on Closer Co-operation in the Treaty of Amsterdam: the Politics of Flexibility in the European Union", p.103.

compromise between the claim to authority of national governments and national legal systems, and the competing claim of the EU. Philippart and Edwards capture this precisely: "[t]he system is designed around the defence of the cohesion and coherence of the European construction (even if Amsterdam has no provision for any solidarity mechanism) and the recognition of the continued significance, if not primacy of national interests".[68]

This observation leads to the criticism that Dworkin is mistaken to argue that integrity is and should be our bench mark of legitimacy. He is wrong in his assessment of justified authority: instead, we would often prefer to accept the nearest approximation to a morally and practically sound legal solution, with its corresponding decrease in integrity and coherence in the law as a whole. Contrary to Dworkin's portrayal of decision-making, whether in politics or in law, we are willing to accept compromises that may run against the principle of integrity. As Raz says, Dworkin's assumption that it is unintelligible for people to accept a less coherent body of principles over a more coherent alternative is false: "[n]obody who cannot have a whole loaf refuses, on principle, half of one".[69]

The closer co-operation provisions in the TA demonstrate this point once more: the restrictive nature of the mechanism may have the consequence that Member States will not use it but instead adopt forms of co-operation outside the TA procedures. As Shaw says, "there is nothing in the Treaty to prevent forms of informal flexibility which effectively bypass all democratic structures as well as the formal legitimacy controls of the courts and the rule of law".[70] Faced with the choice between integrity and greater legitimacy, we choose the latter. Dashwood for one would certainly do so: "a highly differentiated Union – what Deirdre Curtin once called "a Europe of bits and pieces" – is preferable

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[68] *Ibid.*, p.102.

[69] Raz, *Ethics in the Public Domain*, p.313, and see also p.298.

[70] Shaw, "The Treaty of Amsterdam: Challenges of Flexibility and Legitimacy", p.85.

to a coherent Community with bits and pieces of closer co-operation going on around it".[71]

We do not value integrity to the extent that Dworkin suggests, particularly if it is achieved by silencing many different voices in order to achieve the one voice with which the 'community personified' speaks. It has been suggested that a complex community can never speak in a single voice, and that Dworkin's insistence upon integrity does away with inevitable inconsistencies while offering only "a very strained coherence" in their place. In relation to the European Union we are faced with a pluralist society simply too heterogeneous in its ideology to accept the sort of 'tidying up' and imposition of coherence that integrity demands.[72] In relation to the brute realities of the process of achieving (or not achieving) political consensus in the Union, Dworkin's vision advertises an "extraordinarily idealized, romanticized account of law - impossibly clean and orderly".[73]

For Raz, this forcing of the law into one integral unity is not only a denial of the plurality of 'voices' behind the law, but denies the variety of the aims, goals and principles of the various bodies which enjoy legal authority.[74] And in considering the ramifications of the argument that Dworkin's model of political integrity does not fit the politics of the European Union, it may be that this is the most telling for Dworkin's theory: the lack of integrity within the Union is, when seen in practice, far less damaging to its authority and legitimacy than

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[71] Dashwood, "States in the European Union", p.214.

[72] See Waldron, "The Circumstances of Integrity", p.8. Dworkin does comment on this 'dystopic' criticism of his work under the title of 'internal skepticism' in LE (pp.266ff, and more specifically, the section on the Critical Legal Studies movement from p.271), and dismisses it. Yet Dworkin's main argument against Critical Legal Studies, that it ignores the distinction between contradictory and competing principles, runs into the same difficulties, in that it continues to set up integrity as a principle competing with justice. See the discussion in Waldron at pp.9-12.

[73] Schlag, "Normativity and the Politics of Form", p.862.

[74] Raz, *Ethics in the Public Domain*, p.307.

Dworkin's work assumes. What might this mean for Dworkin's theory of political and legal integrity? It suggests that integrity does not do what it claims to do: it does not give an account of law which explains the premise that the existence of law cannot be separated from its claim to normative authority.

4.3 The authority of law: Raz's critique of integrity

Raz gives a detailed critique of Dworkin's theory of integrity based upon the objection that Dworkin fails to account for the authoritative nature of law.[75] Raz begins by arguing that the law always and necessarily claims that it has legitimate authority, and goes on to show that since the law claims to have authority it is capable of having it.[76] Once this point is established, Raz identifies two features which must be possessed by anything capable of being authoritatively binding. These two features are as follows:

> "First, a directive can be authoritatively binding only if it is, or is at least presented as, someone's view of how its subjects ought to behave. Second, it must be possible to identify the directive as being issued by the alleged authority without relying on reasons or considerations on which the directive purports to adjudicate".[77]

These features are necessary characteristics of law and necessary characteristics of authority.

Raz's argument is, in summary, that Dworkin's conception of law contradicts these two features. As we saw, Dworkin argues that 'the law' includes the best justification of the legal materials. This best justification may be one that has

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[75] Raz criticises Dworkin in various articles and monographs. Here I concentrate particularly upon his arguments as set out in "Authority, Law and Morality", and in chapter 13 of *Ethics in the Public Domain* ("The Relevance of Coherence").

[76] Raz, "Authority, Law and Morality", pp.300-302.

[77] *Ibid*, p.303.

never been thought of before, one that has never before been explicitly mentioned either in judicial opinion or legislative statement.[78] Dworkin's theory here clearly contradicts the first feature of authority (and thus of law, which claims authority for itself). According to Dworkin, there can be laws which do not express anyone's judgment on what their subjects ought to do, nor are they presented as expressing such a judgment.[79]

Neither does Dworkin's theory fulfil the second necessary characteristic of authority. Quite contrary to that condition, Dworkin argues that the identification of much of the law depends on considerations which are the very same considerations which the law is there to settle. On Dworkin's conception of integrity, establishing what the law is involves judgment on what it ought to be.[80]

Raz concludes that Dworkin's theory is therefore inconsistent with the authoritative nature of law. The rationale for authority and the authoritative instructions of which law consists is to enable people to act on 'nonultimate reasons', to "save them the need to refer to the very foundations of morality and practical reasoning generally in every case".[81] Law must mediate "between the precepts of morality and their application by people in their behaviour",[82] but Dworkin's conception denies to the law this fundamental role.

In his detailed notes to the text of *Law's Empire* Dworkin considers, and rejects, Raz's criticism of his work on this score. Referring to the Raz's article in The Monist ("Authority, Law and Morality"), Dworkin replies that Raz "falls back

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[78] LE, p.247.

[79] Raz, "Authority, Law and Morality", p.309.

[80] Raz is careful to underline here that his disagreement with Dworkin is not about how judges should decide cases: his argument here is aimed at Dworkin's claim to offer not only a theory of adjudication but a theory of law ("Authority, Law and Morality", p.310).

[81] Raz, "Authority and Justification", p.136.

[82] Raz, "Authority, Law and Morality", p.310.

upon linguistic rules, to say that this is just what 'law' or 'authoritative' means under criteria for its application educated lawyers and laymen accept".[83] Yet Dworkin's dismissal of Raz's argument does not square with a detailed reading of it. As Finnis points out,[84] Raz explicitly denies that he assumes such unanimity or conceptual clarity and instead founds his argument on claims about what practices are "servic[e]able"[85] and beneficial and (evaluatively) "important"[86] - exactly the type of reasons Dworkin demands when he says that any plausible argument must be "an argument of political morality or wisdom". Finnis agrees with Raz: Dworkin fails to recognise the worth of having clear rules "for securing that litigants are treated uniformly at a given time".[87] A sound legal theory, according to Finnis, should have no hesitation in tracing the authority of law back to convention, not consensus of independent conviction.

Raz's arguments are convincing, but once more we seem to be swinging backwards and forwards between the legal positivist emphasis upon rules, and Dworkin's emphasis upon the reasons behind them. Raz's argument is essentially one that emphasises the need for authoritative rules in order to secure co-ordination within a community, and which resonates with the ideals commonly associated with the concept of the Rule of Law, such as predictability and stability. Yet there is a constant dialectic between a political community's need of such stability, and its need of flexibility in certain situations. Schauer, discussing the differences between what he terms the jurisprudence of rules (of which Raz's work would be an example) and the jurisprudence of reasons (Dworkin), argues:

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[83] LE, p.431.

[84] Finnis, "On Reason and Authority in *Law's Empire*", p.369.

[85] Raz, "Authority, Law and Morality", p.304.

[86] *Ibid.*, p.320.

[87] Finnis, "On Reason and Authority in *Law's Empire*", p.378.

> "when the moral and political stakes are high, as in constitutional adjudication, or when we are uncertain of the values we wish stabilized, as with common law adjudication, we have implicitly embraced something much closer to the jurisprudence of reasons then to the model of rules".[88]

For the purposes of this chapter the most important aspect of this quotation is that the emphasis moves away from the characteristics (authoritative, legitimate) of the object (law) and instead introduces a subject - the 'we' who are 'uncertain'. For in reflecting upon legitimacy and authority we are, once more, back at the issue of perspectives.

An immediate connection should be made here with the problem of perspectives picked up in Chapter One of this thesis while discussing what Dworkin terms the 'preinterpretive stage' - the point at which the rules and standards taken to provide the content of the practice are identified. Dworkin criticised Hart's work on his terms, assuming it to be an interpretation of the law; MacCormick and others noted that Hart gave a far more plausible explanation of the stage of identifying the law - which may then go on to be interpreted. We saw that the seemingly insurmountable difference between Hart (and other legal positivists) and Dworkin could be easily explained by distinguishing two different approaches from which law can be studied (what were termed the 'committed normative' and 'detached normative' points of view).

Any reflections on the nature of authority and legitimacy in the European Union must encompass further consideration of the question of perspective. The focus of this chapter is "the critic", by which cryptic title I have in mind the person who approaches law obliquely by stepping even further back and examining more carefully the nature of the various possible points of view. In Chapter One, I distinguished three types of perspective: the *external perspective*,

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[88] Schauer, "The Jurisprudence of Reasons", p.869.

the *detached, normative perspective*, and the *committed, normative perspective*. Within the last, 'committed normative' perspective, I briefly looked at the individual, the judge, and the 'practically reasonable person' (Finnis' 'central case'). In the next section I will present the arguments of J.M. Balkin, my chosen critic, who goes much further in his analysis of the relationship between the object being studied and the subject who studies it.

4.4 Perspectives again - this time critically

4.4.1 Partial perspectives

Although it is possible to separate out different perspectives on law by identifying those generally associated with particular subjects, such as the judge (as has crudely been done in the organisation of this thesis), it must be emphasised that the blueprint of a perspective is rather to be found in the *purposes* of the subject.[89] We saw in Chapter One that the purposes of an individual in her role as a legal scientist distinguish this perspective from that which she holds as an individual citizen. Balkin extends this argument by insisting that there are as many different forms of legal understanding (and perspective) as there are purposes in understanding the law. Coherence, or integrity, for example, is more than a property of law; it is the result of a particular way of thinking about the law. He argues that we must "shift the focus...from the study of the properties the legal system is thought to have...to the nature of the legal subject who apprehends the legal system and judges it to have these properties".[90]

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[89] A person who seeks to understand something is a 'subject'; that something is the 'object' of her understanding. See Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence", p.106, note 1. See further, e.g., Pierre Schlag, "The Problem of the Subject".

[90] Balkin, "Understanding Legal Understanding", p.106.

The goal of this approach, says Balkin, is "not to replace all inquiries about the legal object with those about the legal subject; it is rather to see the subject and object of legal interpretation as equal partners in the constitution of the legal system".[91] It is a critical perspective, in the sense that it does not deny the importance of the internal perspective (on the contrary, it "takes seriously the contributions of subjectivity to the nature of law")[92] but at the same time, "instead of taking for granted the primacy of the internal viewpoint of participants in the legal system, [it] asks how this internal experience comes about".[93]

Balkin turns his critical perspective upon Dworkin, and argues that judgments of integrity and coherence as 'recommended' by Dworkin only arise when we understand the law in a particular way. It is one of many approaches to law that can be adopted by a subject for a particular purpose, and that will have a particular result. He calls this special type of legal understanding 'rational reconstruction', which is, briefly, "the attempt to see reason in legal materials - to view legal materials as a plausible and sensible scheme of human regulation".[94] The experience of legal coherence is "the result of our attempt to understand law through the process of rational reconstruction".[95]

Yet there is no compulsion to take up the viewpoint of rational reconstruction - it is only one interpretative attitude that we can adopt. We could, for example, understand a legal system according to a perspective of rational *deconstruction*, where we "critically examine legal doctrine to discover its shortcomings".[96] While the goal of rational reconstruction is to bring a charitable attitude towards

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[91] *Ibid*, p.107.

[92] *Ibid.*, p.110.

[93] *Ibid.*, pp.110-111.

[94] *Ibid.*, p.122.

[95] *Ibid.*

[96] *Ibid.*, p.124.

the legal object, and "to envision how it could be a reasonable accommodation of principles and policies that are themselves reasonable",[97] the goal of rational deconstruction is to examine legal doctrine in order to discover its shortcomings; it "is not to see the law's substantive rationality, but its failures in that regard".[98]

It is an easy to task to point to examples of both types of legal understanding in the practice of and comment on EC law. Deirdre Curtin's article on the changes introduced by the Treaty of Maastricht,[99] for example, falls squarely within Balkin's viewpoint of rational deconstruction: the "bricoleur's amateurism" she metaphorically finds in the haphazard construction of the elements of the (then) new European Union is repeatedly held up (and found wanting) against the "master bricklayer's strive for perfection and attention to detail".[100] Rational reconstruction, on the other hand, can be found in practically any of the judgments of the European Court of Justice, and is manifested even more clearly in the principled and rationalising opinions of the Advocates General.

For Dworkin, his program of interpretation and of adjudication is the only acceptable way of viewing law. Yet ironically enough, Dworkin himself demonstrates that there are many more ways of understanding an object than his picture of interpretation and his rationally reconstructive program of law as integrity would suggest. Balkin criticises the way in which Dworkin obscures "not only the many different forms of legal understanding, but also the many different forms of nonlegal understanding".[101] His discussion of the Critical Legal Studies movement is, as Balkin points out, a clear example of a case in

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[97] *Ibid.*

[98] *Ibid.*

[99] Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces".

[100] *Ibid.*, p.24.

[101] Balkin, "Understanding Legal Understanding", p.134.

which Dworkin's purpose is manifestly *not* to portray an object in its best light: when Dworkin is describing and criticising CLS, "constructive interpretation and interpretive charity are thrown out the window".[102] Dworkin's mistake is to fail to take the implications of his own argument to their logical conclusion: "if law is truly an interpretive enterprise, we must necessarily be concerned with the ideological, sociological, and psychological features of interpretation and their effects on our internal experience of understanding".[103]

Balkin takes up the criticism levelled at Dworkin by Finnis and others, and noted in Chapter One of this thesis: that Dworkin is mistaken to pick out one particular form and purpose of understanding (in his case, that of the Herculean judge) and bestow upon it the title of *the* internal perspective. However, Dworkin is in good company: to forget the purposive and contextual component to all understanding is the "occupational hazard of traditional jurisprudence",[104] according to Balkin. The person who understands law for the purpose of rational reconstruction (the ECJ judge, for example) and the person who understands law for the purpose of prediction (Rasmussen's 'realist' approach to the European Court of Justice springs to mind) might each believe that they are engaged in the same enterprise and that the other party is mistaken. "In fact, each is merely projecting [his] situated, purpose-driven subjectivity onto the object of their study and giving it the name of 'the theory of law'".[105]

It is perfectly possible to agree with Dworkin that judges do and should take up the perspective of rational reconstruction when deciding cases. However, while

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[102] *Ibid.* Balkin notes that Dworkin dismissses CLS in "five pages and two lengthy footnotes", a tendency to set aside his own practices of argument which is repeated in relation to other theoretical positions contrary to his own. Charles Silver has argued, for example, in relation to Dworkin's understanding of legal positivism, that "Dworkin rarely asks whether an argument he calls positivistic is the best argument a Legal Positivist could make" - Silver, "Elmer's Case: A Legal Positivist Replies to Dworkin", p.381-2.

[103] Balkin, "Understanding Legal Understanding", p.109.

[104] *Ibid.*, p.131.

[105] *Ibid.*

there is nothing wrong with offering a normative or descriptive theory of judicial understanding, it must be labelled accurately. The problem is that Dworkin believes that explicating this form of understanding also explicates the nature of law.[106] The consequence of Dworkin's view is, suggests Balkin, that "the subject, her purposes, and her preconceptions disappear from view. Interpretation has become purposeless and subjectless".[107]

We saw in Chapter One that one of the strengths of Kelsen's approach is that he, unlike Dworkin, understood the partial nature of his own perspective and took certain points of view to be complementary (sociological and normative jurisprudence, for example). It is Cotterrell who highlights this aspect of Kelsen's work, and Cotterrell who writes most clearly about the obfuscatory nature of a failure to understand the partiality of one's own perspective:

> "normative legal theory has too often been presented as if it represented truth about the nature of law, when what it actually represents is a certain partial perspective or cluster of closely related perspectives on law...Normative legal theory...becomes mystificatory only when it is assumed that what is being discussed is not primarily the particular mode of thought of lawyers about law in a certain context but, in some general and timeless sense, the nature of law. Then, normative legal theory, assuming itself to be not a specific, partial perspective or limited range of perspectives on law but a somehow complete perspective, turns into professional ideology...It is ideological precisely because it does not even notice that its own perspective is inevitably limited and incomplete".[108]

Ideology is, of course, hardest to resist when considering the fundamental issues of the legitimacy and authority of law. I shall set out further Balkin's explication

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[106] *Ibid*, p.133. This criticism of Dworkin is widespread - see, for example, Schauer, "The Jurisprudence of Reasons", p.851, and Ruth Gavison, "Comment on Dworkin".

[107] Balkin, "Understanding Legal Understanding", p.133.

of the critical perspective in order more effectively to return to Dworkin, the European Community, and its political and legal legitimacy.

4.4.2 The critical perspective

As we saw, Balkin suggests that we ground jurisprudence in a critical perspective, one which sees the subject and object of legal interpretation as equal partners in the constitution of the legal system.[109] Balkin goes on to elaborate further on the nature of this critical perspective. It has, he proposes, three aspects. Firstly, legal understanding is a purposive activity of subjects, not simply the apprehension of preexisting properties of a subject. Secondly, understanding depends not just on the purposes of the subject, but also upon features of the self: judgments of legal coherence and incoherence, for example, are "shaped by the features and sources of our understanding - our preexisting commitments, values, and beliefs, and our knowledge and ignorance of the legal system".[110] Thirdly, legal understanding is itself a source of power over the subject. The process of understanding can never leave us untouched: "we must recognize not only the effects that our understanding has on the objects we construct, but the effects that the act of understanding has on us".[111]

As far as the first aspect of the critical perspective is concerned, it is clear that Dworkin views the political legitimacy (or lack of legitimacy, as the case may be) of a legal system as a property of that system. For him, the European Community is legitimate if its political practices accept the principle of integrity - if it makes laws which are coherent and which express a commitment to a coherent scheme of principle. Dworkin's rational reconstruction of the law uses what Balkin calls a test of hypothetical justification: "The law (or some part of

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[108] Cotterrell, *The Politics of Jurisprudence*, p.229.

[109] See Balkin, "Understanding Legal Understanding", pp.106-7.

[110] *Ibid.*, p.112.

[111] *Ibid.*, p.113.

the law) is coherent[112] if we can explain it by a set of consistent principles and policies which, *if they were justified*, would justify the content of legal doctrine".[113] Yet he also employs the technique of rational deconstruction where necessary, which adopts a test not of hypothetical justification but of *actual* justification: "The law (or some part of the law) is coherent if we can explain it by a set of consistent and *justified* principles and policies which, taken together, justify the content of legal doctrine".[114]

Balkin, through detailed argument and over several pages, shows that the use of these two tests, and the consequence of taking up the points of view of rational reconstruction and deconstruction, is to spike us on the horns of a dilemma.

> "A theory of actual justification too readily collapses questions of coherence into those of moral justification and thus guarantees that almost any existing legal system will lack coherence. On the other hand, a principle of hypothetical justification, by divorcing questions of coherence from those of moral justification, seems to do no important justificatory work at all; it threatens to make the issue of coherence tautological".[115]

The result, then, is "an endless dialectic"[116] between the two tests, in which one side constantly defends the consistency of legal doctrine while the other attacks it. The dilemma cannot be resolved so long as the subject refuses or is unable to step outside the circle and look more closely at her purposes in engaging in these types of understanding.

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[112] I will not dispute Balkin's characterisation of Dworkin's theory as a coherence theory of law, although this point is disputed. Raz, for example, discussing coherence theories, does not include Dworkin's among them, although he argues that Dworkin's is open to many of the same objections. See Raz, *Ethics in the Public Domain*, pp.319-321.

[113] *Ibid.*, p.117.

[114] Balkin, "Understanding Legal Understanding", p.117.

[115] *Ibid.*, p.117. On the dialectic between the tests of actual and hypothetical justification, see pp.117-121. On rational reconstruction and deconstruction, and their employment of the justification dialectic, see pp.124-127.

If it is accepted that any understanding of authority and legitimacy will be tempered according to the purpose of the subject, not simply by identification of certain properties of the object, then not only Dworkin's theory but also that of Raz is necessarily partial. Balkin suggests that Raz's discussion of coherence, although made with greater consciousness of the influence of the chosen point of view, is still incomplete in that Raz fails to identify the further categories within his chosen perspective of 'participant', and the further distinctions between them arising as a result of their various purposes. While Dworkin, we saw, makes the mistake of picking out the perspective of the judge, Raz makes the mistake of picking out one form of understanding practised by "particular legal elites" and then "[bestowing] upon it the title of '*the* internal perspective'".[117]

I will return to the purposes of the subject in the next section, where I attempt to use the critical perspective to shed further light on the authority of the decisions of the European Court of Justice. For the moment, however, I will move on to the second element of the critical perspective: the influence upon understanding of the features of the self. Continuing with the example of rational reconstruction, Balkin discusses three features of subjectivity that will shape such judgments. I will summarise them very briefly. First is the state of our moral and political beliefs: "political ideology...actively assists in the construction of the legal object of interpretation".[118] The second is the state of our knowledge about the legal system: Balkin suggests that our knowledge of 'what the law is' is remarkably limited, even for individuals who regularly practise law, with the consequence that "our judgements about the coherence

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[116] *Ibid.*, p.121.

[117] *Ibid.*, p.132.

[118] *Ibid.*, p.137.

of the legal system or parts thereof may be as much matters of faith and ideological presupposition as the consequence of reasoned analysis".[119]

The third is the state of our efforts at rational reconstruction through considering possible conflicts of value between legal doctrines. What Balkin seems to mean by this is that although we may purport to escape from our own subjectivity by viewing legal doctrines as in some way competing amongst themselves, we are misguided to do so: there is no understanding and there is no judgment of coherence or legitimacy that is not made by a particular subject. The implications of this are two-fold. Firstly, our experience of legitimacy will be necessarily grounded in our social situation and in the manner in which we encounter law, and secondly, our understanding of legitimacy will be dynamic - our continuing experience as individuals will shape and change our judgments.

Although I will later come back to the third point, I have raced through these features of subjectivity because I want to give greater attention to Balkin's treatment of the theory that any subject engaged in understanding is greatly influenced by a psychological need to reduce irrationalities and incoherences in the world around him. This is the theory of cognitive dissonance, which claims that "when faced with inconsistent beliefs and attitudes, we engage in cognitive work to reduce the resulting dissonance".[120] Since individuals need to believe that their *own* beliefs are ordered, coherent and rational, when dissonance occurs in the object studied, it will lead to a change in the behaviour, beliefs or attitudes of the subject.

When considering how judgments of legal coherence will be affected by this need, Balkin suggests, the key question is whether an individual has an 'ontological stake' in the coherence of the legal system. It will, in fact, be very

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[119] *Ibid.*, p.139.

[120] *Ibid.*, p.144, citing the work of J. Richard Eiser, *Social Psychology: Attitudes, Cognition and Social Behaviour* (1990) and Susan T. Fiske and Shelley E. Taylor, *Social Cognition* 467-68 (1991).

likely that an individual will have a considerable stake in believing that the norms and arrangements in the society in which she lives are morally coherent. For example, they will probably have used those norms to justify their own actions. Their own code of conduct may well be partly if not entirely constituted by that of the society's. Any challenge to the belief of the justice and coherence of the society's norms would require enormous effort on the part of the individual to arrive at alternative conceptions of the vast number of standards that they unselfconsciously accept and apply.[121]

At first glance, practising lawyers "would seem likely candidates for strategies of dissonance reduction to avoid uncomfortable conclusions about legal coherence and incoherence", says Balkin.[122] Yet clearly different types of lawyers will have different stakes in the system. A judge of the European Court of Justice will have a strong stake in believing in the rationality of the system he has helped to create. Similarly, a judge of a Member State will have a similar stake in the coherence of the relationships between his national system and the Community. A legal academic will most probably have a very weak stake, however, since academics' role is often to discover normative *disorder* in the law - although this may be restricted to local pockets of law, not the entire canvas.

The theory of cognitive dissonance leads us to the third element of the critical perspective: the affect that legal understanding itself has on the subject. Rational reconstruction, for example, "is not merely something that we do to the law; it is also something that the law does to us".[123] The act of understanding affects both the subject as well as the object of interpretation. Whenever we seek to understand a text we must be open to the possibility that it is true and that it has something to teach us: understanding is "the willingness to be confronted by

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[121] *Ibid.*, pp.146-148.

[122] *Ibid.*, p.149.

[123] *Ibid.*, p.151.

what the text says and recognize it as possibly having more authority than our own judgments".[124]

This is why "we are not wholly safe" when we interpret:

> "To understand is not, as some might think, to study the object of interpretation at a distance, free from its claims upon us. It is above all to be challenged, to be vulnerable to the alteration of our own beliefs through the fusion of horizons. To risk understanding is to risk change".[125]

There are two dangers, Balkin argues, in any act of understanding. Firstly, we run the risk that interpretation will become simply an affirmation of our existing beliefs and traditions: understanding may mean "the reinforcement of existing prejudices already located in ourselves and in the constructed object of our contemplation".[126] The second danger stems from the way that the object of understanding confronts us with its claims to truth. We saw that understanding involves willingness to change: it is however possible that we may be seduced into agreeing with the wrong things. These two dangers are thus two symmetrical difficulties inherent in interpretation: that we will too easily conform the interpreted object to match our preexisting beliefs (Balkin calls this the problem of *conformation*) and that we will too easily tailor our beliefs to match the interpreted object (*co-optation*).[127]

We saw in the previous chapter that Dworkin's objections to accounts of judicial decision-making which attempt to constrain the feared evil of a rogue judge struck a chord of truth when he pointed out that the image of the deviant judge is the stuff of fantasy in the huge majority of cases. A conversation with

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[124] *Ibid.*, p.153, citing Hans-Georg Gadamer, *Truth and Method* (Garrett Barden and John Cumming trans., 1975), p.262.

[125] *Ibid.*, p.159.

[126] *Ibid.*, p.160.

[127] *Ibid.*, p.162.

any judge in the European Court of Justice will confirm the suspicion that accusations of seditious political manoeuvering and politically motivated activism on the part of the Court are simply not credible - just as in national legal systems, judges tend in good faith to apply what they sincerely believe to have identified, to the best of their ability, as the law.[128]

Balkin's critique does in fact support Dworkin's insistence upon the fact that disagreement about the law does not match the 'rogue judge' accounts of legal decision-making. Yet it also strikes another chord, this time in dissonance with Dworkin, in that it suggests that the problem may be quite different: the danger of conformation, for example, is that when a liberal judge looks at the law, she already sees liberal principles emanating from it and understands deviations from these principles as simply mistakes. In other words, the problem may be not the consciously subversive judge but the entirely sincere judge, who is "destined to see the law according to her own ideological perceptions and beliefs".[129]

The danger of co-optation is just as strong. The history of the first decades of the European Community gives a good example of a situation in which those involved in understanding and interpreting this unprecedented type of legal organisation were subject to great pressure in making of it a success. Given that understanding is a type of vulnerability and receptivity, it is not surprising if any newcomer, whether to the Commission, Court of Justice, or any other Community institution, or a newcomer to the study of Community law, asks less *whether* Community legal doctrine makes sense than he or she attempts to grasp *why* it makes sense.

Any judge might feel somewhat daunted, faced with the warnings that Balkin's critical analysis of understanding gives. Assuming that she rejects a consciously

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[128] Of course this does not mean that judges never apply political morality: but political morality is applied not because it is their own but because they believe it to be sound in the legal system within which they work. There is a great difference between the two.

[129] Balkin, "Understanding Legal Understanding", pp.162-3, note 122.

sceptical position, such as anarchism, and that she wants in good faith to try and interpret and apply the law as well as she can, she is faced with an obstacle course. She is told by Dworkin's 'program of adjudication' to emulate his ideal judge, to attempt to give Herculean judgments by interpreting the law in the best light possible. Yet Balkin's critique tells her that she cannot escape herself, that Hercules may easily fall foul of the dangers of conformation and co-optation; that, oblivious to his psychological inclinations to reduce cognitive dissonance, Hercules may too easily match his own moral and political convictions to the law as he sees it; that in encouraging Hercules to focus exclusively on the object of interpretation, Dworkin may actually prevent Hercules (and his human imitators) from a necessary awareness of the effect of the features of his own self upon the law and the effect of the law upon himself.

Furthermore, the Dworkinian judge will be engaged in rational reconstruction, which, Balkin argues, may well create the cognitive stake in the coherence of the legal system that leads to an individual's attempts to reduce any dissonance found. This, he says, is the "unanticipated corollary" of Dworkin's claim that all knowledge of law is interpretive:

> "If disagreements about law are interpretive, we may have a personal stake in our interpretations because our reconstruction of the law has produced an agreement between ourselves and the constructed object of interpretation. Our interpretations - which include our work at rational reconstruction - have become part of our beliefs, and our own sense of self-worth may depend upon their acceptance and success".[130]

How, then, is a judge to tackle the job of making decisions while fighting the urge to reduce cognitive dissonance, resisting the temptation of conformation and co-optation, and maintaining a constant alert with regard to her particular purposes, her effects upon the law and its effects upon herself? How can one

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[130] *Ibid.*, p.164.

ever say that the decisions of a judge and the judgments of a court are legitimate? It is with these questions in mind that we move on to the next chapter, which focuses upon the legitimacy of the European Court of Justice.

4.5 Conclusion

Before beginning that new chapter, however, a brief recap of all the threads exposed in this chapter is in order. I began by discussing authority and legitimacy as concepts which could be applied to social organs such as rulers and courts, and distinguished three kinds of authority which might make up a judgment of 'legitimacy': social, legal and justified authority. It was the third type of authority and its relation to legitimacy which was taken to offer the most fruitful exploration of the authority and legitimacy of the EC. I then moved on to the work of Ronald Dworkin, who offers a particular model of political legitimacy based on his theory of interpretation and of integrity in law and politics. Taking only the first stage of his two-stage test of interpretation, that of fit, I found that it was disputable that integrity fits the legal and political practices of the EC. This would seem to be a death blow, on Dworkin's terms, to any claim that the governance and law of the EC are legitimate.

However, this result had to be viewed in a different light once Raz's arguments that Dworkin's theory is inconsistent with the authoritative nature of law were considered. The dialectic between the 'model of rules' and the 'model of reasons' led back, once more, to perspectives, for an application of Balkin's work to the question of authority and legitimacy showed that we should not look at legitimacy as the property of an object alone, but open our eyes to the effect of the properties of the subject. It became clear that our exploration of legitimacy, just as in relation to system and authority as discussed in Chapters Two and Three, must look to both subject and object: our understanding will be tempered by both the purposes of the subject and the relation between subject and object. Chapter Five, which follows, takes a look at both subject and object in the situation in which the subject takes on probably the greatest

prominence in interpreting a social practice: the case of a judge interpreting the law.

Part Four

Legitimacy

Chapter Five

The Judge

Introduction

In Chapter One, I described the two types of situation where the committed, normative perspective is taken up in relation to law. The first is that of the individual who looks to norms of law as reasons for action. The second is that of the judge who interprets and applies the law. This chapter is concerned with the second situation, and more particularly, with the perspective of the judges who interpret and apply the law of the European Union.

We have already seen that in developing his theory of law, Ronald Dworkin adopts the internal, participant's point of view. I argued in Chapter One that Dworkin's project fails because he fails to distinguish between 'law' and 'the law', offering as a theory of law what might best be described as a theory of adjudication. This criticism came out more clearly in Chapter Four, where concentration on the question of the subject we engage in understanding law demonstrates how stunted a view of law which takes solely the eyes of the

appellate judge will necessarily be. As Balkin says, "[t]here is nothing wrong in offering a normative or descriptive theory of judicial understanding if it is understood and labeled as such. The problem is that Dworkin believes that explicating this form of legal understanding also explicates the nature of law".[1]

However, rejecting Dworkin's claim to offer a theory of law does not entail rejecting his claim to offer a 'program of adjudication'. In *Law's Empire* Dworkin offers a sophisticated and subtle account of the unique perspective of the judge in the judge's unique role of not only understanding and interpreting but also applying law. Bengoetxea analyses the ECJ:

> "as an institution which engages in social action mainly by furthering the Community project and continually reshaping EC law as a coherent order inspired by some notion of integrity or system. It is in this respect that the ECJ is a Dworkinian court".[2]

This chapter considers this claim, the task that faces the judges who apply European Union law, and how Dworkin's program of adjudication might work within the Union system. These judges who apply EU law are, of course, the judges of every Member State, but I focus particularly upon the cases and judges of the European Court of Justice.

Chapter Four ended with the question: how can one ever say that the decisions of a judge and the judgements of a court are legitimate? This, for Dworkin, is 'the problem'. First of all, this chapter will consider 'the problem' in relation to the EU, using a particular and well-known case (*Francovich*) as an example. Secondly, I shall take a quick look at the debate on judicial legitimacy of the European Court of Justice. Thirdly, I will briefly set out the main points of Dworkin's 'program of adjudication', and how it relates to some of the popular

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[1] Balkin, "Understanding Legal Understanding", p.133.

[2] Bengoetxea, *The Legal Reasoning of the European Court of Justice*, p.9.

theories of adjudication in the EU. Fourthly, I will clarify the extent to which I believe Dworkin's program is open to criticism as a theory of adjudication: I return once more to the question of the subject, and the nature of Hercules, and conclude that integrity must eventually give way to justice at the point at which the judge must choose. With these qualifications I then go on to apply Dworkin's theory to another well-known case, *Brasserie du Pêcheur* and *Factortame*.

5.1 The problem

The problem is the way that people decide what 'the law' is. A particular bone of contention in the context of the European Union is the way that the judges of the European Court of Justice decide cases. As Dworkin puts it,

> "Since it matters...how judges decide cases, it also matters what they think the law is, and when they disagree about this, it matters what kind of disagreement they are having".[3]

Since the Court of Justice gives collegiate judgments and its deliberations are secret we do not have written records of the disagreements its judges have over what the law is in any given case. However, disagreements there most certainly are, just as there are disagreements about what the law is amongst the parties of the case, the Advocate General who gives his opinion, the Member States and Community institutions that intervene with their views, and all the lawyers and interested individuals that are concerned to ask themselves that question.

Dworkin sets out his answer to the problem by attempting to unravel the argumentative nature of our legal practice: he joins that practice and "[struggles] with the issues of soundness and truth participants face".[4] He begins and illustrates his theory by describing some actual cases decided by judges in the

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[3] LE, p.3.

United States and Britain for, as he says, all his arguments are "hostage to each reader's sense of what does and can happen in court".[5] Here I will begin by describing an actual case decided by the European Court of Justice: *Francovich* v *Italy*.[6]

5.1.1 An example: the *Francovich* case

Sig. Francovich, Sig.ra Bonifaci and thirty-three others were employees of companies that had gone bankrupt, owing them millions of lire in unpaid wages. Just this situation had been envisaged years earlier at the Community level and in October 1980 the Council had issued a directive which had the specific aim of protecting employees in the event of the insolvency of their employer.[7] The method chosen to do this was for the Member States, in implementing the directive, to set up guarantee institutions financed by employers. The Member States were required to comply with the directive by 23 October 1983 at the latest. However, Italy did not do so and in February 1989 the Court of Justice declared that it had failed to fulfil its obligation.[8]

By 1990 Sig. Francovich and the others had still received nothing and so they brought proceedings against the Italian Republic. They firstly argued that the directive had direct effect, and so claimed from the State the guarantee payment that the guarantee institution would, if Italy had implemented the directive, have given them. Their alternative claim was for damages for the loss they had suffered as a result of Italy's failure to implement the directive. The Italian tribunals decided that further interpretation of Community law was needed, and referred three preliminary questions to the Court of Justice. The first, which

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[4] LE, p.14.

[5] LE, p.15.

[6] Joined Cases C-6/90 and C-9/90, [1991] ECR I-5357.

[7] Directive of the Council of 20 October 1980 (80/987/EEC).

[8] *Commission* v *Italy*, Case 22/87, [1989] ECR 143.

alone will be considered here, concerns the possible direct effect of the directive and, in the alternative, the issue of the non-contractual liability of Italy.[9]

The European Community Treaties provide a particular procedure, to be found in Article 234 of the EC Treaty, under which national courts can refer questions of Community law to the Court of Justice. The Court gives a 'preliminary ruling' if requested to do so by a national court or tribunal. In Sig. Francovich and the others' case, the Pretore di Vicenza and the Pretore di Bassano del Grappa requested an interpretation of Community law on the two questions set out above. Following the Article 234 procedure (or Article 177, as it was at the time), the European Court did not decide Sig. Francovich's case: it gave a ruling on an abstract point of law which was then used by the Italian courts to give a judgment.

The Court of Justice firstly considered the question of the direct effect of the directive. The concept of directly effective rights has a very specific meaning within Community law. Normally the status of an international treaty in its signatory member states depends on the *member state's* rules regarding international law. If the national legal system is 'dualist', such as that of the UK, treaty law has to be enacted explicitly into national law in order to have effect there. In the European Community, however, Community provisions can create rights which individuals may rely upon before their domestic courts: this is the concept of 'direct effect'. This concept was elaborated by the Court of Justice in a celebrated passage in a celebrated case, *Van Gend en Loos*:

> "Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way

[9] The *Francovich* case (*cit.*).

upon individuals as well as upon the Member States and upon the institutions of the Community".[10]

If the Court found that the directive did confer directly effective rights, Sig. Francovich and the others would have been entitled to a remedy in national law.

However, not all obligations of Community law have direct effect. There are certain conditions: a measure must be clear and unambiguous, it must be unconditional, and it must not depend on further implementation by the Community institutions or the Member States.[11] The Court found that the insolvency directive did not fulfil these conditions, and so the directive did not have direct effect.

The Italian courts had asked whether, in any event, Sig. Francovich and the others could claim reparation for the loss and damage they had suffered as a result of Italy's failure to implement the directive. Yet the Treaties contained no provision expressly and specifically governing the consequences of breaches of Community law by the Member States (as the Court of Justice explicitly recognised in a later case),[12] in contrast to the provision made by the Treaty for the non-contractual liability of the Community institutions.[13] According to one view, the Court should have therefore stopped there: in the absence of an explicit written Treaty norm, there was "no Community law on the matter"[14] and so it should have fallen to the national law of the Member State concerned to determine whether the State were liable.

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[10] *Van Gend en Loos* v *Nederlands Administatie de Belastingen*, Case 26/62 [1963] ECR 1, p.12.

[11] *Francovich*, para. 12 of the judgment, and see Hartley, *The Foundations of European Community Law*, p.200.

[12] *Brasserie du Pêcheur SA* v *Federal Republic of Germany* and *R* v *Secretary of State for Transport, ex parte Factortame Ltd and Others*, Joined Cases C-46/93 and C-48/93, [1996] ECR I-1029.

[13] Article 288 of the EC Treaty.

[14] *Francovich*, Observations of the Netherlands Government, p.5368.

Yet according to the plaintiffs in the case, there *was* Community law 'on the matter'. They argued that the absence of a Treaty provision did not mean that Community law denied them a remedy. According to the plaintiffs, the case-law of the Court of Justice showed that EC law allowed them to claim damages for their loss. The lawyers of Sig. Francovich and the others pointed to several earlier decisions of the Court of Justice where the Court had decided that States should compensate people for damage caused to them through the State's infringement of Community law. In a 1975 case, for example, the Court ruled that a man who had lost money when a state body acted in contravention of Community law should be compensated for the damage he had suffered.[15] In 1990 a group of women who had been required to retire earlier than male colleagues by their employer, a state body,[16] an act which was an infringement of Community law, were able to rely on the provisions of a directive in order to claim for damages.[17]

The lawyers of Sig. Francovich and the others relied on these cases as precedents, decisions which had made it part of the law that people in their position are entitled to compensation. In systems of common law, such as those of the United States and of England and Wales, 'precedent' is a binding source of law. These systems both have doctrines of precedent, which means the doctrine that "decisions of earlier cases sufficiently like a new case should be repeated in the new case".[18] The European Community is different, however. There is clearly no *strict* doctrine of precedent, which obliges judges to follow

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[15] *Russo* v *AIMA*, Case 60/75 [1976] ECR 45.

[16] In this case the Court also faced the question whether the women's employer, British Gas, could be classified as part of the State before its privatisation. A claim for damages could only be pursued if, on the test the Court laid down, British Gas was part of the State; the House of Lords later did decide that British Gas, when a nationalised industry, was an emanation of the State for the purpose in question.

[17] *Foster* v *British Gas*, Case C-188/89 [1990] ECR I-3313.

[18] LE, p.24.

the earlier decisions of certain other courts, even if they believe those decisions to have been wrong.

Writers about Community law disagree about the bindingness of precedent, although both the Advocates General and scholars use the term in discussing the European Court's past decisions. A.G. Toth has shown that opinion ranges from the belief that the Court of Justice's case-law is not binding and not a formal source of law, to the view that the Court's decisions are binding on all European courts except the ECJ itself.[19] The middle ground view is that the case-law "is at least de facto binding" because "the Court is so consistent in following its past decisions".[20] Barcelò notes that although the Court never refers to past decisions as 'precedents', it does use the cases as justification for stated rules or principles.

Differences of opinion between lawyers about the obligation to follow some past decision on the question of law they now face may explain why some cases are controversial. This was not, however, the point of controversy in *Francovich*. The disagreement was about what law the cases contained. The doctrine of precedent only comes into play if the past decisions cited are sufficiently like the present case as to be 'in point'. "Sometimes one side argues that certain past decisions are very much in point, but the other side replies that these decisions are 'distinguishable', meaning they are different from the present case in some way that exempts them from the doctrine".[21] Thus the UK and German governments argued that the cases the plaintiffs' lawyers had cited were distinguishable because those cases involved directly effective rights contained in a regulation, not a directive, and certainly not a directive without direct effect. Another difference was that although the Court said that the plaintiffs should be

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[19] See Toth, "The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects".

[20] Barcelò, "Precedent in European Community Law", p.415.

[21] LE, p.26.

compensated, it also said that it was for the State involved and its courts to provide a remedy: in *Russo*, for example, the Court said that the State was liable "in the context of the provisions of national law on the liability of the State".[22]

In the view of Germany, the UK and the Netherlands, the cases cited were not only distinguishable but supported *their* view: Advocate General Mischo notes that "the plaintiffs...and the Commission on the one hand and the UK and the Netherlands Government on the other all cited those same judgments in support of divergent if not contrary propositions".[23] How can people who have the text of a decision in front of them disagree so radically about what it actually means, and about what law it has made? How can people disagree so radically about what the law *is*?

Such radical disagreements can arise because people have different ideas about what, properly, makes up the law, and about ways of identifying the law are acceptable. These ideas can be said to be theories about the way in which the law should be interpreted. Typically, however, these theories and the (normative) ideas about the proper grounds of law are not explicit. We have already seen that on one view the lack of an explicit Treaty provision on the non-contractual liability 'exhausted' the law on the subject; the plaintiffs, on the other hand, had a theory of law which extended beyond the Treaties.

In *Francovich* the Court of Justice employed a method of interpretation which is particularly associated with it: a method which is usually termed the 'teleological' approach to legal interpretation. The Court argued that "[t]he issue must be considered in the light of the general system of the Treaty and its fundamental principles".[24] It pointed to particular principles contained elsewhere in Community law and interpreted the law on non-contractual

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[22] At para. 9 of the judgment.

[23] *Francovich*, Opinion of Advocate General Mischo, p.I-5384.

[24] *Francovich*, para. 30 of the judgment.

liability of a Member State as conforming as closely as possible to these principles. The first principle it relied on was the principle that the rights conferred upon individuals by Community law must be protected. This principle was linked to the fundamental tenet that Community law must be fully effective, and to the duty of the Member States, contained in Article 10 of the EC Treaty, to "take all appropriate measures...to ensure fulfilment of their obligations under Community law".

The Court reasoned that "the full effectiveness...of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain redress when their rights are infringed by a breach of Community law for which a Member State can be held responsible".[25] The availability of compensation was also "particularly indispensable" where, in the absence of action by the State, "individuals cannot enforce before the national courts the rights conferred upon them by Community law".[26] The Court therefore concluded that "the principle whereby a State must be liable for loss and damage caused to individuals as a result of the breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty".[27]

The Court employed its own particular theory of law and interpretation in deciding *Francovich*: others compared the decision against their personal theories of law in criticising it. Trevor Hartley, for example, commented that the judges of the ECJ had used the *Francovich* case as part of their "campaign to make directives fully effective", implying that the Court's reasoning was in fact a sham, a cover for a purely political decision.[28] In Hartley's view the Court in some cases does not really try to identify the law. All the judges really want to

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[25] *Francovich*, para.33 of the judgment.

[26] *Francovich*, para.34 of the judgment.

[27] *Francovich*, para.35 of the judgment.

[28] Hartley, *The Foundations of European Community Law*, p.225.

do is promote their own values and objectives. He accuses the Court of "judicial legislation",[29] and of ignoring "the distinction between what the law ought to be and what it is".[30] In his view the ECJ has "given judgment contrary to the Treaty", and these "departures from the objective meaning of the Treaty were not the result of inadvertence, or a misunderstanding of the text, but were deliberate".[31] Are Hartley's criticisms justified? How are Community judges supposed to decide the cases in front of them, and how do we assess whether their decisions are correct?

5.2 The critics of the court: a turmoil of red herrings?

Both judges and critics do - and necessarily must - use some normative theory of law in making or criticising decisions. We saw in Chapter One that Phelan's claims to be outside legal theory boiled down to no more than a refusal to engage with theoretical positions other than his own. Similarly, critics of the Court of Justice who condemn or approve of its decisions are without fail assessing judgments against their own bench-mark theory of legitimate decision-making. Hjalte Rasmussen is quite simply wrong when he says that "a normative theory of interpretation of Community law is not a precondition for discussing meaningfully judicial excess of power"[32] and that, further, the *formulation* of a normative theory of interpretation of Community law is not even feasible.[33]

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[29] Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", p.95.

[30] Hartley, *The Foundations of European Community Law*, p.87.

[31] Hartley, *Constitutional Problems of the European Union*, p.41.

[32] Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court", p.29.

[33] *Ibid.*, p.35.

On the contrary, any statement that a judge or court has acted wrongly presupposes some normative yardstick which demonstrates what the correct act would have been. Rasmussen, for example, comments that the Court did not have "the slightest justification for ruling the way it did"[34] in the seminal case *Van Gend en Loos*.[35] The Court offered justifications for its decision: Rasmussen offers no explanation for his opinion that those justifications were not acceptable. Joseph Weiler was entirely correct to criticise Rasmussen on the ground that "[i]f the Court has acted improperly one is presumed to have a criterion, the application of which would indicate what the proper result should have been".[36]

Rasmussen in fact contradicts himself: he claims that he rejects the possibility of a normative theory of interpretation, while at the same time giving us the seeds of his own. His criticism of *Van Gend*, for example, is based on a theory about the importance of fidelity to the plain meaning of a legal text: he says that the Court of Justice "went way beyond the textual stipulations of [Article 189(3)]".[37] Similarly, he approves of the decision in another case because the interpretation "remains within the textual limitations established by the language of [the] Article".[38] He also refers to the extent of the European Court's loyalty to the intention of the 'Founders of the Community' as another element in the acceptability or otherwise of the Court's judgments.[39]

Trevor Hartley, another vigorous critic of the ECJ, also has strong views about the role of the text in legal interpretation. His condemnation of several of the Court's judgments is based on a theory which gives pride of place to the

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[34] Rasmussen, *On Law and Policy in the European Court of Justice*, p.12.

[35] Case 26/62, [1963] ECR 1.

[36] Weiler, "The Court of Justice on Trial", pp.565-6.

[37] Rasmussen, *On Law and Policy in the European Court of Justice*, p.12.

[38] *Ibid*, pp.26-7.

[39] *Ibid*, p.26.

"natural meaning of the words used"[40] and which condemns decisions which he characterises as "contrary to the text".[41] And it is clear that any theory of interpretation of written sources of law such as provisions of the European Treaties must give place to the words which form them; as a one-time judge at the Court of Justice has said: "You have to start with the wording of a provision, with its ordinary or special meaning".[42] This approach towards identifying the law has been classified in relation to the ECJ as the 'textual method', normally the "point of departure of all interpretation" by the Court.[43]

Yet the textual method forms only part of the Court of Justice's theory about the way it should decide its cases. It is another method of interpretation which is most famously (or infamously, depending on one's point of view) associated with the ECJ: the so-called teleological method. It was to this method that the Court was turning in *Francovich* when it said that the issue of the non-contractual liability of the Member State had to be considered "in the light of the general system of the Treaty and its fundamental principles".[44] Teleology is the study of final causes and ultimate objectives, and the purpose of the legal teleological method is "to interpret a rule taking particular account of the purpose, the aim and the objective which it pursues".[45]

The Court of Justice favours teleological reasoning[46] and its corresponding emphasis on the "fundamental principles of the Community legal system",[47]

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[40] Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", p.95.

[41] See pp.96, 100 and 101.

[42] H. Kutscher, "Methods of interpretation as seen by a judge at the Court of Justice", p.I-5.

[43] See Bredimas, *Methods of Interpretation and Community Law*, p.34.

[44] At para. 30 of the judgment.

[45] F. Dumon, "The case-law of the Court of Justice - A critical examination of the methods of interpretation", p.III-87.

[46] Tridimas, "The Court of Justice and Judicial Activism", p.204.

[47] *Brasserie du Pêcheur*, para. 26 of the judgment.

which it believes to be "generally accepted methods of interpretation".[48] However, it is clear that this approach to law is not accepted by Hartley, nor Rasmussen, nor by certain other critics of the Court.[49] Yet this rejection of the reasons the Court gives for its decisions is supported by no discussion or argument explaining why the Court's interpretation is wrong. Hartley, for example, does not even mention the importance the ECJ gives to teleological reasoning. From demonstrating that the Court in some cases does not always limit itself to the literal and "natural" meaning of the text (perfectly true), he leaps to the radical conclusion that the Court therefore makes decisions outside the law, simply pursuing its own political agenda of promoting European federalism.[50]

The charges are grave: not only that the Court has usurped its role but that it has done so "in pursuance of a settled and consistent policy".[51] This is typical of the nature of criticism of the ECJ: as Edward says, "it seems...to be suggested that each of the [members of the Court] has successively been enveigled (but by whom?) into the web of an ongoing conspiracy".[52] But as Tridimas points out, "[n]o persuasive argument has so far been made why, in exercising its interpretative function, it would not be legitimate for the Court to seek guidance from the spirit and the scheme of the Treaties and to seek to further integration".[53]

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48 *Ibid.*

49 See, for a recent example, Sir Patrick Neill Q.C., "The European Court of Justice: A Case Study in Judicial Activism". Neill argues that the Court of Justice has breached the boundaries of its judicial role and that many of its judgments are "logically flawed or skewed by doctrinal or idiosyncratic policy considerations" (p.245).

50 See Hartley, *The Foundations of European Community Law*, pp.86-90, and "The European Court, Judicial Objectivity and the Constitution of the European Union", p.95.

51 Hartley, *The Foundations of European Community Law*, p.95.

52 David Edward, "Judicial Activism - Myth or Reality?", p.31.

53 Tridimas, "The Court of Justice and Judicial Activism", p.205.

The question of the correct approach to interpretation of Community law has been further muddied by the use of the terms 'activism' and 'passivism' in criticising certain of the ECJ's judgments. Judicial 'activism', as Pierre Pescatore says, is "une expression éminemment subjective...Ce qui est décrié comme activisme par l'un est perçu par l'autre comme une protection juste et nécessaire".[54] Rasmussen, for example, condemns judgments as unacceptably activist and therefore illegitimate, while negating any criteria of legitimacy apart from the "known reactions to the European Court's jurisprudence given by society's countervailing powers",[55] by which he means the other Community institutions plus the courts, parliaments, administrations, legal commentators, press and so on of the Member States.[56] Apart from the fact that this test ignores the role of courts in protecting minorities against majority power,[57] it can in no way reflect upon the legitimacy or legality of the Court of Justice's judgments. To say that a judgment is 'activist' on Rasmussen's terms merely reflects the extent and the nature of the public response to it, no more.

This is not enough. The question of what the law is and how it can be identified is fundamental. Faced with a case which could provoke or has provoked censure from the 'countervailing powers', the central issue is the question of law: what *do* the Treaties,[58] properly interpreted, actually require? If the right answer to that question in the *Francovich* case is that the Member States must compensate individuals to whom they have caused loss and damage as a result of breaching Community law, then deferring to a contrary opinion of the

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54 Pescatore, "Jusqu'où le juge peut-il aller trop loin?", pp.301-302.

55 Rasmussen, "Between Self-Restraint and Activism: A Judicial Policy for the European Court", p.36.

56 *Ibid.*, p.36, and *On Law and Policy in the European Court of Justice*, pp.7-8.

57 See Cappelletti, "Is the European Court of Justice 'Running Wild'?", where he points out that "it is one of the most important virtues of the judicial function...*not* to be strictly bound to the environment's powers and pressures" (p.6). See also Weiler, "The Court of Justice on Trial", p.570.

58 Or, more widely, "the law of the European Union".

"countervailing powers'" would be to amend Community law in just the 'activist' way critics such as Rasmussen think so appalling. As Ronald Dworkin says, the question of law is inescapable.[59] If critics of the Court ignore it, "all their indignation about judicial usurpation...is irrelevant to legal practice, a turmoil of red herrings".[60]

5.3 Ronald Dworkin and the question of law: a program of adjudication to recommend to judges and use to criticise what they do

Ronald Dworkin's work in his book *Law's Empire* is all about the question of law. He elaborates a solution to the problems that we face when confronted with disagreement about the law such as that we saw in the *Francovich* case. He focuses on one particular question: "how can the law command when the law books are silent or unclear or ambiguous"?[61] The answer to this question, the core of his program of adjudication, is that "legal reasoning is an exercise in constructive interpretation, that our law consists in the best justification of our legal practices as a whole, that it consists in the narrative story that makes of these practices the best they can be".[62]

5.3.1 Constructive interpretation and law as integrity

Interpretation takes place in many different contexts. The most common context, which is probably also the most familiar to us, is conversation, when we interpret the "sounds or marks another person makes in order to decide what he has said".[63] Interpretation of conversation is "purposive": "it assigns meaning in the light of the motives and purposes and concerns it supposes the

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[59] LE, p.371.

[60] *Ibid.*

[61] LE, p.vii.

[62] *Ibid.*

[63] LE, p.50.

speaker to have",[64] reporting this meaning as the 'intention' of the speaker. Artistic interpretation is also familiar to us: critics interpret books and films and paintings in defending some view of their "meaning or theme or point".[65]

It is central to Dworkin's theory of law that he believes the interpretation of law, and in fact of all social practices, to be analogous to the interpretation of art. He explains as follows:

> "[T]he interpretation of a social practice...is like artistic interpretation in this way: both aim to interpret something created by people as an entity distinct from them, rather than what people say, as in conversational interpretation, or events not created by people, as in scientific interpretation".[66]

The nature of legal and artistic interpretation is particularly to be distinguished from the interpretation of what people say. Legal and artistic interpretation are instances of *creative* interpretation; the latter of *conversational* interpretation.[67] Although all three are concerned with purpose, and in interpreting works of art or social practices we may aim to decipher the authors' intentions in writing a particular novel or a community's purpose in creating a practice of courtesy, creative interpretation is not conversational but *constructive*. The purposes in play in creative interpretation are not the purposes and intention of the author or community but of the interpreter herself. Interpretation of art, or courtesy, or law, "is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong".[68]

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[64] *Ibid.*

[65] *Ibid.*

[66] *Ibid.*

[67] See LE, pp.50-53.

[68] LE, p.52.

However, the interpreter is not free to capriciously make any interpretation she may wish. The interpretation takes place within certain boundaries, since "the history or shape of a practice or object constrains the available interpretations of it".[69] Dworkin also takes pains to clarify that the 'author' still has a role to play in the interpretation of art and of social practices:

> "[E]ven if we reject the thesis that creative interpretation aims to discover some actual historical intention, the concept of intention nevertheless provides the formal structure for all interpretive claims. I mean that an interpretation is by nature the report of a purpose; it proposes a way of seeing what is interpreted - a social practice or tradition as much as a text or painting - as if this were the product of a decision to pursue one set of themes or visions or purposes, one 'point' rather than another".[70]

Therefore, creative interpretation, "on the constructive view, is a matter of interaction between purpose and object...A participant interpreting a social practice...proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify".[71]

The constraints on the interpreter, however, do not exclude the possibility that there may be competing interpretations. The "raw data" may not - in fact, typically will not - lead to only one possible interpretation: "those data will be consistent with different and competing ascriptions".[72] In these cases, the initial test, based on these data, gives way to another: each interpreter must then make a choice which "must reflect his view of which interpretation proposes the most

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[69] *Ibid.*

[70] LE, pp.58-9.

[71] LE, p.52.

[72] LE, p.52.

value for the practice - which one shows it in the best light, all things considered".[73]

The 'data' of law lead to many possible interpretations, and Dworkin develops his own by considering two other alternatives.. One he terms 'conventionalism', the idea that judges discover and enforce special legal conventions.[74] The second is 'pragmatism', which finds the best interpretation of law in the idea that judges do and should make whatever decisions seem to them to be the best for the community's future, not counting any form of consistency with the past as valuable for its own sake.[75] It is however the third conception of law which concerns us here. This is 'law as integrity', the interpretation of law that Dworkin constructs and champions.

> "Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative".[76]

Law as integrity also differs from conventionalism and pragmatism in that it does not offer itself *as* an interpretation of our legal practice.

> "Law as integrity...is both the product of and the inspiration for comprehensive interpretation of legal practice. The program it holds out to judges...is essentially, not just contingently, interpretive; law as integrity asks

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[73] LE, p.53.

[74] See LE, p.410 and Ch.4.

[75] See LE, p.95 and Ch.5.

[76] LE, p.225.

them to continue interpreting the same material that it claims to have successfully interpreted itself".[77]

Law as integrity, unlike conventionalism and pragmatism, therefore offers itself as a program *of* interpretation.

Dworkin shows his concept of law as integrity in action by comparing law with literature, drawing an analogy between a judge deciding what the law is on some issue and a literary critic "teasing out the various dimensions of value in a complex play or poem".[78] He introduces an "artificial genre of literature"[79] that he calls the 'chain novel'.

> "In this enterprise a group of novelists writes a novel *seriatim*; each novelist in the chain interprets the chapters he has been given in order to write a new chapter, which is then added to what the next novelist receives, and so on...[T]he novelists are expected to take their responsibilities of continuity...seriously; they aim jointly to create, so far as they can, a single unified novel that is the best it can be".[80]

Each novelist must try and make the novel "the best novel it can be constructed as the work of a single author rather than, as is the fact, the product of many different hands".[81] In doing so, he must make various judgments about what he has been given:

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[77] LE, p.226.

[78] LE, p.228.

[79] LE, p.229.

[80] *Ibid.*

[81] *Ibid.*

"He must take up some view about the novel in progress, some working theory about its characters, plot, genre, theme and point, in order to decide what counts as continuing it and not as beginning anew".[82]

Although he will not be able to find a single, exhaustive theme ("because the value of a decent novel cannot be captured from a single perspective"),[83] structure can be given to any interpretation he considers, by distinguishing two dimensions on which it can be tested.

As we saw briefly in Chapter Four, the first of these dimensions is the dimension of fit: a rough threshold requirement that an interpretation must meet if it is to be at all credible.[84] The novelist cannot adopt an interpretation if he "believes that no single author who set out to write a novel with the various readings of character, plot, theme and point that interpretation describes could have written substantially the text he has been given".[85] It is not necessary that the interpretation should fit every bit of the text, but it must nevertheless have "general explanatory power";[86] "it is flawed if it leaves unexplained some major structural aspect of the text".[87]

If the novelist finds that more than one interpretation fits the bulk of the text, he must move on to the second test: the dimension of justification, or substance. This test "requires him to judge which of these eligible readings makes the work in progress best, all things considered".[88] The interpretation tested must provide a sound or even decent justification of the text in order to be

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[82] LE, p.230.

[83] *Ibid.*

[84] See LE, p.255.

[85] LE, p.230.

[86] *Ibid.*

[87] *Ibid.*

[88] LE, p.231.

acceptable.[89] At this point his more substantive aesthetic judgments come into play, judgments about the artistic importance of the ideas the novel could be taken to express. However, the two dimensions are not entirely separable:

> "[T]he formal and structural considerations that dominate on the first dimension figure on the second dimension as well, for even when neither of two interpretations is disqualified out of hand as explaining too little, one may show the text in a better light because it fits more of the text or provides a more interesting integration of style and content".[90]

The distinction between the dimensions of fit and of justification is therefore not so clear as may first seem: it is however "a useful analytical device that helps us to give structure to any interpreter's working theory or style".[91]

The dimensions of fit and justification do not give structure only to a literary interpretation but also to an interpretation of law. The interpreter must first ask whether the interpretation he is testing fits the legal practices of his community, and then, in examining which of competing interpretations is best, which one offers the best justification of those legal practices. Dworkin's theory of law as integrity then asks that judgment be made: the two dimensions of the interpretive judgment must come together and so the interpreter "must also meld these dimensions into an overall opinion: about which interpretation, all things considered, makes the community's legal record the best it can be from the point of view of political morality".[92]

Law as integrity asks a judge deciding a case to think of himself as an author in the chain of law,[93] working from the standpoint of political morality just as the

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[89] See LE, p. 139.

[90] LE, p.231.

[91] *Ibid.*

[92] See LE, p.411.

[93] See LE, pp.238-9 and p.313.

novelist must interpret the chain novel as a story that he must continue according to his judgment of how to make that story as good as it can be from the standpoint of aesthetics. In order to "exhibit the complex structure of legal interpretation",[94] Dworkin introduces an imaginary judge of "superhuman intellectual power and patience"[95] who accepts law as integrity: a judge called Hercules. Hercules is immediately put to work 'deciding' an English common law case, since the similarity of legal interpretation to literary interpretation and the concept of the chain novel are most evident in the absence of a statute or other legislative source.[96]

While European Community law does not encompass a 'common law' in the Anglo-American sense of the term,[97] I will appropriate Hercules for a quick look at two joined cases in which the argument did, nevertheless, "turn on which rules or principles of law 'underlie' the related decisions of other judges in the past":[98] *Brasserie du Pêcheur* and *Factortame*.[99] First, however, I will take a closer look at Dworkin's theory, and how it might fit into the European Union context.

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[94] LE, p.239.

[95] *Ibid.*

[96] See Dworkin, *A Matter of Principle*, p.159.

[97] I believe the arguments Dworkin offers regarding the interpretation of 'common law' cases are still applicable to the European Community. He defines common law cases as cases in which "no statute figures centrally in the legal issue, and the argument turns on which rules or principles of law 'underlie' the related decisions of other judges in the past" (*A Matter of Principle*, p.159) - in other words, cases in which "the plaintiff appeals not to a statute but to earlier decisions by courts" (LE, pp.23-4). There are clearly cases in EC law which fulfil this wide definition: for example, as Advocate General Mischo noted, the entire argument in *Francovich* was based on the case-law of the Court of Justice (para. 36 of his Opinion). *Brasserie du Pêcheur* and *Factortame* were the following episode in the *Francovich* saga and the argument of the parties similarly relies on EC 'common law'.

[98] Dworkin, *A Matter of Principle*, p.159.

[99] Joined Cases C-46 and 48/93, *Brasserie du Pêcheur S.A.* v *Germany*, *R* v *Secretary of State for Transport, ex p. Factortame Ltd* [1996] ECR I-1029.

5.4 'Law as integrity' in the European Union

I will return to the critics of the Court of Justice and ask how Dworkin's 'program of adjudication' might relate to some of the theoretical arguments that have been raised as support for accusations of judicial activism and criticisms of its decisions. The first section considers the role of the preambles of the Community Treaties, while the second compares the Court's favoured 'teleological method' of interpretation with law as integrity and tries to show how they differ. The third looks at the views of those who have criticised the way the Court interprets legal texts, and the fourth considers more generally the view that the Court should interpret Community law according to the intention of those who created it.

5.4.1 The role of the preamble and other 'political' guidelines

Should the preambles and other provisions of the Community Treaties which state the principles and purposes of the Community be taken into account by people interpreting the law? Rasmussen for one argues not: he says that such guidelines are essentially political in nature and not judicially applicable. To seek inspiration in such guidelines is, he believes, "the root of judicial activism which may be an usurpation of power".[100] Cappelletti, however, disagrees, saying that it is perfectly legitimate for the Court of Justice to rely on them; in fact, the Court has a duty to promote the policies stated within them.[101]

Dworkin would support Cappelletti: since the core of law as integrity is a standpoint which views the law of a community as the expression of that community's commitment to a background scheme of principle, the statements of principle and purpose within the Community Treaties can be used by the judge in constructing the best interpretation he can of the law he is concerned

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[100] Rasmussen, *On Law and Policy in the European Court of Justice*, p.62. See also p.508.

[101] Cappelletti, "Is the European Court of Justice 'Running Wild'?", p.9.

with in a particular case. The judge who accepts law as integrity may also look to other formal declarations of general institutional purpose, which provide a contemporary interpretation of the law that was created at that time:

> "He acknowledges that legislation is seen in a better light, all else being equal, when the state has not misled the public; for that reason he will prefer an interpretation that matches the formal statements of legislative purpose...".[102]

This will particularly be the case if it is likely that citizens have made crucial decisions relying on those statements.

5.4.2 Law as integrity and teleological interpretation

The Court of Justice generally begins with the language of the provision to be interpreted: "You have to start with the wording of a provision, with its ordinary or special meaning".[103] However, although it does use several methods of interpretation,[104] it favours the 'teleological method' of reasoning, in particular in relation to the Community Treaties. Dumon defines it as follows:

> "Teleology is the study of final causes and of ultimate objectives...The purpose of the *legal* teleological method is to interpret a rule taking particular account of the purpose, the aim and the objective which it pursues".[105]

Thus the Court will consider issues before it "in the light of the general system of the Treaty"[106] and by reference to the "fundamental principles of the Community legal system".[107]

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[102] LE, p.346.

[103] Kutscher, "Methods of interpretation as seen by a judge at the Court of Justice", p.I-5.

[104] More generally on the Court's methods, see Anna Bredimas, *Methods of Interpretation and Community Law*, and Bengoetxea, *The Reasoning of the European Court of Justice.*

[105] Dumon, "The case-law of the Court of Justice - A critical examination of the methods of interpretation", p.III-87.

The wide contextual approach of the teleological method is clearly similar to the program of adjudication Dworkin holds out in the form of his theory of law as integrity. The teleological method also seems to have been developed by the Court in a way which resonates with the constructive understanding of interpretation championed by Dworkin. Dworkin argues that interpretation of law is constructive in that lawyers must interpret it as something created by people as an entity distinct from them. Bredimas describes how the Court approaches its task in a way which seems constructive, in Dworkin's sense: it "starts from the fact that the Communities exist and by deduction draws the consequences of the established order".[108]

However, law as integrity is not to be equated with the teleological method of interpretation. Law as integrity is not a method of interpretation: it is *essentially* interpretive, in that it argues that law in itself is an interpretive concept and that the content of law depends on more refined and concrete interpretations of the same legal practice that it has begun to interpret.[109] As such it encompasses the different methods the Court of Justice might employ: they are all available to play a part in integrity's requirement that the interpreter constructs the best interpretation possible of the Community's legal practice.

The different methods of interpretation, such as literal interpretation or teleological reasoning, play a part in a constructive interpretation of Community law only in so far as they contribute to and constitute the interpretation that best fits and justifies that law. For example, on some types of issues the best interpretation of the law will be that which, ostensibly, gives precedence to a literal method; it most conceivable situations it will matter more, for example, that the term of each Member State's presidency of the Council is settled and

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[106] *Francovich*, para. 30 of the judgment.

[107] *Brasserie du Pêcheur*, para. 27 of the judgment.

[108] Bredimas, *Methods of Interpretation and Community Law*, p.79.

[109] LE, p.410.

not open to fresh consideration by the Court of Justice, than exactly what that term is. This use of the literal method would be, however, the *result* of the approach of law as integrity, judging that the principle of legal certainty and a literal understanding of the language provide, in that case, the best interpretation of the law.

It accordingly follows that teleological interpretation may often (legitimately) figure in the interpretation of Community law if its emphasis on purpose and fundamental principles consistently offers the best constructive interpretation of that law. Pescatore, for example, approves the Court of Justice's use of teleological reasoning on the grounds that it is particularly suited to the nature of EC law:

> "Les traités instituant les Communautés sont entièrement pétris de téléologie...Les traités sont entièrement fondés sur la notion d'objectifs à atteindre...[L]a méthode téléologique n'est pas ici une méthode d'interprétation parmi d'autres; bien loin de là, il s'agit d'une méthode particulièrement approprié aux caractéristiques propres des traités instituant les Communautés".[110]

Kutscher agrees that only a teleological and dynamic approach matches "the special features and requirements of the Community and its legal system".[111] Kutscher writes that the Court necessarily had to flesh out the bones of the Communities that the Treaties had provided: the Treaties had given a framework, defining with great clarity the plan, principles and objectives of the European Community project, but little detail. In that situation the Court was

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[110] Pescatore, "Les objectifs de la communauté européenne comme principes d'interprétation dans la jurisprudence de la Cour de Justice", pp.327-328.

[111] Kutscher, "Methods of interpretation as seen by a judge at the Court of Justice", p.I-46.

compelled to have recourse to the scheme, guidelines, principles and purposes underlying them.[112]

However, it is again worth underlining the point that the teleological method of interpretation, like any other method, may only figure in a decision about what the law is only in so far as it contributes to an understanding of the principles of justice, fairness and procedural due process that provide the best constructive interpretation of the community's legal practice.[113] Law as integrity and teleology have a common approach in that they both advocate the interpretation of a rule within its wider context. However, they differ in that law as integrity does not end there: it does not simply propose an interpretation of a rule according to its purpose and context but requires that the interpretation be part of a far more wide-reaching conception of the community's law as expressing both the political and legal principle of integrity.

5.4.3 The 'natural meaning'? Textual interpretation

Criticism of the Court of Justice has in particular focused upon the way it has interpreted the Community Treaties and other 'legislative' sources of law. Recently Hartley, for example, has based a critique of the Court on a view of legal interpretation which rejects the various methods the Court has developed. Hartley's views have been in their turn criticised, particularly by Anthony Arnull in an article dedicated to replying to - and refuting - his accusations.[114] Arnull's critique systematically analyses Hartley's claims; I offer no such detailed consideration of Hartley's arguments. Instead, I will use Hartley's work to draw out the implications of Dworkin's 'law as integrity' for the Court of Justice when it is faced with a text to interpret.

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[112] *Ibid.*, pp.I-33 and I-36.

[113] See LE, p.225.

[114] Arnull, "The European Court and Judicial Objectivity: A Reply to Professor Hartley".

Hartley accuses the Court of Justice of "judicial legislation"[115] on the grounds that it sometimes "interprets provisions of the Treaties contrary to the natural meaning of the words used". He writes that the Court will "occasionally ignore the clear words of the Treaty in order to attain a policy objective",[116] and gives as an example a case based on what was Article 173 (now Article 230) of the EC Treaty in which, Hartley argues, the Court gave a judgment which was clearly "contrary to the text".[117] Commenting on this judgment (*Les Verts*), he argues that the Court's approach to the interpretation of the Article was based on a logic which "ignores the distinction between what the law ought to be and what it is",[118] and, further, that the Court in this and other cases has demonstrated that it "does not consider itself bound by the Treaties if they conflict with what it regards as desirable in the interests of the constitutional development of the Community".[119]

If the Court of Justice really does ignore what Community law is and instead substitutes its views on what it ought to be, Dworkin's program of adjudication would support Hartley in his criticisms of it. Considering the responsibilities of judges deciding constitutional cases, Dworkin says:

> "Law as integrity condemns activism, and any practice of constitutional adjudication close to it. It insists that justices enforce the Constitution

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[115] Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", p.95. See also Hartley, *Constitutional Problems of the European Union.*

[116] Hartley, *The Foundations of European Community Law*, p.86.

[117] Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", p.101, commenting on Case 294/83, *Parti Ecologiste 'Les Verts'* v *European Parliament*, [1986] ECR 1339. See also Hartley, *The Foundations of European Community Law*, p.86.

[118] Hartley, *The Foundations of European Community Law*, p.87.

[119] Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", p.101.

through interpretation, not fiat, meaning that their decisions must fit constitutional practice, not ignore it".[120]

But in order to understand whether Hartley's criticisms are justified, the first issue that must be faced is the question of what is the law: what does Community law, properly interpreted, actually require? What does Dworkin's 'program of adjudication' recommend when the primary source of Community law is a provision of the Treaty, or a regulation? The skeleton of the answer to this question is the same as that for common law cases. Hercules, as our super-human law-as-integrity judge, must read legislation in whatever way follows from the best interpretation of the legislative process as a whole.

"Integrity requires him to construct, for each statute he is asked to enforce, some justification that fits and flows through that statute and is, if possible, consistent with other legislation in force".[121]

This justification must take into account both policy and principle and offer the best case possible for what the plain words of the statute plainly require.[122] This holds for constitutional provisions too: since a constitution is foundational of other law, so Hercules' interpretation of the document must be foundational as well: it "must fit and justify the most basic arrangements of political power in the community, which means it must be a justification drawn from the most philosophical reaches of political theory".[123]

What did Community law, properly interpreted, require in Hartley's example *Les Verts*? In this case the French Ecology Party brought an action under Article 173 (now 230) of the EC Treaty for review of a decision of the European Parliament to allocate funding to political parties, supposedly to pay for an

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[120] LE, p.378.

[121] LE, p.338.

[122] *Ibid.*

[123] LE, p.380.

information campaign about the work of the Parliament. However, this campaign was prior to the 1984 Parliamentary elections, and the funding effectively went towards the parties' election campaign costs. The distribution of the money was also biased in favour of parties already represented within the EP, and discriminated against parties seeking representation for the first time, of which the French Ecology Party was one.

At the time of the challenge of *Les Verts*, Article 173 of the Treaty of Rome provided that:

> "The Court of Justice shall review the legality of acts of the Commission and the Council..."

The Parliament was not included as an institution whose acts were open to challenge. For Hartley, the provision was "perfectly clear", and the judgment that the Court gave, which did allow the decision of the Parliament to be reviewed, was thus "contrary to the text" and an instance of judicial legislation.[124] But Hartley's view that the Court's judgment was contrary to the text can only be sustained by a theory of literal interpretation which equates the law with the series of words in the legal text. Dworkin's theory offers a different view: Article 173 conceived as a series of words is to be distinguished from Article 173 conceived as the expression of the law.[125] There was no disagreement about what the provision said, but there was obviously disagreement about what the provision meant.

Hercules' duty, in interpreting Article 173, is to decide what it means in accordance with the best justificatory combination of principles and policies that he can construct for it. He must treat it as flowing from a background scheme of

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[124] See Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", pp.100-101, and *The Foundations of European Community Law*, pp.86-7.

[125] See above, where Dworkin's distinction between a poem conceived as a series of words and a poem conceived as the expression of a particular metaphysical theory or point of view was noted.

political morality to which the European Community is committed and which underlies the legal system as a whole. It will be clear to Hercules, examining the case, that the intention of the Member States at the time of drafting Article 173 was to exclude the acts of the European Parliament from judicial review. Although the wording is clear, however, he will immediately recognise the case as difficult, not because of the language but because once he begins to construct the best justification he can for the Article, he finds that the body of principles and policies underlying it suggests that its exclusion of the European Parliament is incoherent with the law that the Member States have since created.[126]

Hercules' problem in *Les Verts* is comparable to an example Dworkin gives to demonstrate the way in which although a legal text can be perfectly clear there may still be fundamental disagreement about what law it actually expresses. Elmer had murdered his grandfather: he was convicted and sentenced to jail. His grandfather's will provided that Elmer was to inherit the bulk of the estate, but in "Elmer's case",[127] the grandfather's daughters now sued the administrator of the will, arguing that since Elmer had murdered their father, the law entitled him to nothing. The relevant statute of wills, however, said nothing about whether someone named in a will could or could not inherit if they had murdered the testator. Elmer's lawyer argued that since Elmer was named in a valid will, in accordance with all the requirements of the statute, he must inherit; to hold for the daughters would be to change the statute and substitute what it believed the law should be for what the law actually was.

Most likely the issue of an heir murdering a testator had not even occurred to the creators of the statute of wills, and on the 'plain and natural meaning' of the

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[126] The distinction between hard and easy cases according to the clarity or opaqueness of the language of a legal text is, for Dworkin, a 'non-distinction' – "[i]t need not be drawn at all" (LE, p.351). The description of a case as 'hard' or 'unclear' is "the result rather than the occasion of Hercules' method of interpreting statutory texts. We will not call a statute unclear unless we think there are decent arguments for each of two competing interpretations of it" (LE, p.352).

[127] *Riggs* v *Palmer*, 115 N.Y. 506, 22 N.E. 188 (1889), discussed by Dworkin in LE, pp.15-20.

text Elmer's lawyer was correct: no exception was made for murderers and so the will was valid. The parallels with *Les Verts* are clear: at the time that Article 173 was drafted, the European Parliament did not even have the capacity to make decisions that affected the rights of third parties - the possibility of adding the Parliament to the list of institutions whose acts would have been subject to judicial review would not have arisen. However, law as integrity requires a judge to interpret the legal text in its context, which includes changes in the purposes and principles underlying it over time.

Law as integrity rejects the view of time that is necessarily incorporated into the 'plain and natural meaning' emphasis of the speaker's meaning theory. Since on that theory legislation is an act of communication to be understood according to the conversational model of interpretation, the question of intention must necessarily converge upon the particular moment in history "at which the statute's meaning is fixed once and for all"[128] - the moment at which the intention of the legislators "gave birth" to that law. Instead, the constructive interpretation of law as integrity allows Hercules to "[interpret] history in motion",[129] because he interprets "not just the statute's text but its life, the process that begins before it becomes law and extends far beyond that moment".[130] His overall task is to make the legislation's story the best it can be, but this means the *continuing* story, and his interpretation therefore changes as the story develops.[131] So in completing his task he will identify not only the legislators at the time of the creation of the legislation but also a variety of people, groups and institutions whose statements, convictions and intentions might be relevant in different ways.[132]

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[128] LE, p.348.

[129] LE, p.350.

[130] LE, p.348.

[131] *Ibid.*

[132] See LE, pp.348-9.

So Hercules, deciding *Les Verts*, would start by examining Article 173 within the context of the system of legal remedies and procedures for review that the Treaty provides and of which it forms a part. He must consider the rationale behind the provision for review of the acts of the Council and Commission and ask upon what grounds the Parliament was excluded from this list, and whether subsequent developments still support that distinction. He will note the principle of judicial review of the acts of the institutions of the Community and must expand his search to ask how diffuse this principle is in the Community legal order, and what weight to give it in comparison with other relevant principles which, for example, limit the categories of people who are to be allowed to challenge such acts. Hercules will, in short, seek to understand what Article 173 legally requires according to the best interpretation of fairness and justice he can construct for it within the legal system of the Community.

The majority of the judges in Elmer's case looked at the principles of justice elsewhere in the law, which gave great weight to the principle that no one should profit from his own wrong, and decided that the statute of wills should be read to deny inheritance to someone who has murdered to obtain it.[133] Similarly, the Court of Justice in *Les Verts* looked to the fact that the European Parliament had, since the framing of Article 173, acquired powers well beyond its original consultative role, and to the principle underlying the Article and to be found elsewhere in the Community legal system that no institution or Member State of the Community should be immune to review of the compatibility of its acts with Community law, deciding accordingly that the Article was to be read as subjecting the Parliament to judicial control.

The program of adjudication that Dworkin's theory of law as integrity holds out to lawyers and judges does not approve or disapprove of the decisions in these cases, but it does approve the way in which the two courts seem to have gone

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[133] See LE, p.20.

about interpreting the texts they had before them. The Court of Justice could have decided that the best justification of Article 173 it could construct demanded that it be read literally, that the meaning of the Article did correspond to the 'letter' of the Article in that particular case.[134] There is plenty of room for discussion and criticism of the relative importance that the Court finally ascribed to the various principles and policies it would have identified in constructing an interpretation of what the Article legally required according to an account which fitted and justified its meaning and its place within the wider body of Community law. But at least the Court would have reached that decision after making an interpretive judgment as to what the law required, not according to an over-simplistic theory of Community law which denies that anything other than the 'plain meaning' of the text is to be understood as law.

So according to the program of law as integrity, it is perfectly possible that Community law, and Article 173, properly interpreted, required that the acts of the Parliament were subject to judicial scrutiny. The correctness of the decision would have to be tested against a detailed and complex reconstruction of the judgments of fit and of justification that the Court apparently made in deciding the case. But law as integrity in no way supports Hartley's and others' view that the Court decided the case in a way which was "contrary to the text" or by judicial fiat.

5.4.4 The role of legislative intention

Shortly after the *Brasserie du Pêcheur* ruling, the UK government, in a paper setting out its position in respect to the EU Intergovernmental Conference, commented that "there is concern that the ECJ's interpretation of laws sometimes seems to go beyond what the participating Governments intended in

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[134] See LE, pp.18-19.

framing these laws".[135] However, following Dworkin's 'program of adjudication', the intention of the Member States (or, for that matter, the Council, Commission and Parliament acting as the Community legislature) should not assume the role that the UK government would wish to see it play. This is both due to the particular nature of the Community legal system but also to the nature of legal interpretation in general and to the demands integrity makes upon the interpretation of Community law.

The question of the intention of the authors of law does, however, bring us back to the nature of authority as discussed in Chapter Four. There we saw that Dworkin's concept of constructive interpretation could be criticised on the ground that it can subvert the nature of and need for authority through law within a community. Although I shall agree with Dworkin that judges should not attempt to establish with what intention the law was created when interpreting texts, I argue that Dworkin is wrong to disregard intention so entirely. Authority, in the end, must dissolve integrity into justice.

The intention of the authors of a Community legal text does not, institutionally, have the same importance given to it in other legal systems: the preparatory documents (*travaux préparatoires*) for the Treaties have never been published, for example, and the discussions of the Council and Commission in preparing legislation are secret. Arnull argues that it is important to recognise that the Treaties, in particular, are not the product of a legislative process but the outcome of diplomatic negotiations: they "contain language on which the national delegations were able to reach agreement, but that is all".[136] Hartley believes, however, that the most important reason why the Court "[disregards]

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[135] White Paper (*A Partnership of Nations*), Cm 3181, 1996; see also Spink, "Contravening EC Law: The Liability of the Member State", pp.124-5.

[136] Arnull, "The European Court and Judicial Objectivity: A Reply to Professor Hartley", p.412.

the subjective intention of the authors of the text"[137] is that the Court prefers to interpret texts on the basis of what it thinks they should be trying to achieve, which "goes beyond interpretation properly so-called: it is decision-making on the basis of judicial policy".[138]

Dworkin terms the theory that statutes and other legislation must be read in accordance with the intentions of their authors, in such a way as to give effect to those subjective intentions, the "speaker's meaning" theory. This theory "treats the various statements that make up the legislative history...not as events important in themselves, but as evidence of the mental states of the particular legislators who made them".[139] Dworkin devotes a detailed discussion to the speaker's meaning theory, which, in America, is a popular argument in the debate over how judges should decide cases. Dworkin's view is that it is fundamentally flawed.[140] Its limitations become immediately apparent once it is asked exactly how it would work in practice; *how* judges should identify the law in this way. Numerous difficulties arise. An intention is part of an author's mental state, but whose mental states count in fixing the intention behind an article of a Community treaty? Every person at the negotiating table, including those who voted against? Are the intentions of some - for example, those who were strongly in favour of the final wording - more important than others? Even if it were possible to decide whose intentions should 'count' as making up the more general legislative intention, there follow insuperable obstacles in identifying which of a person's beliefs, attitudes or other mental states constitutes her intention - that is, if that intention is even clear to the person herself, and always assuming that it does not compete or conflict with her other intentions.

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[137] Hartley , *The Foundations of European Community Law*, p.85.

[138] *Ibid.*

[139] LE, p.314.

However, Dworkin also offers more fundamental arguments against this theory, which can be traced back to his contention that the interpretation of law and other social practices is not an instance of conversational interpretation but of creative interpretation. The speaker's meaning theory is part of a strand of thought which views the interpretation of a social practice as the discovery of the purposes and intentions of the other participants in the practice. But Dworkin rejects this: he points out that the claims and arguments participants in a the practice make are about what *it* means, not about what *they* mean.[141] Dworkin's consideration of the speaker's meaning theory leads him to the conclusion that in the end the judge's only chance to interpret the law according to the intention of the legislature is to "train his interpretive imagination, not on the legislative record of different legislators one by one, but on the record of the legislature itself, asking what coherent system of political convictions would best justify what *it* has done".[142] But at this point the judge has left behind the expectations of the law-makers as to what their language would do and come full circle to consider the question what the law-makers intended to say.

For the criticisms of the ECJ based on its disregard for the intention of the law-makers (whether Member States, Council, Commission or Parliament) are mistaken because they fail to make the crucial distinction between what the law-makers intended their language to *say* and what they expected their language to *do*.[143] When the UK government and others say that the Court of Justice goes beyond what the participating governments intended in framing the Treaties, they must mean that the Court should have identified the law according to what the law-makers expected their laws to do. Dworkin,

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[140] Dworkin discusses legislative intention in detail in relation to statutory interpretation (LE, pp.312-337) and also in relation to the constitution (LE, pp.359-363).

[141] See LE, pp.62-65.

[142] LE, p.335.

[143] See Dworkin, FL, p.13 and p.10.

however, argues that this is wrong: law as integrity demands that a judge look to what the law-makers intended to *say*, and then interpret what they *created*, not interpret their intentions.

Let us return to Hercules. Faced with provisions of the Treaties, regulations, and so on - legislation, for our purposes - Hercules has two strategies to compare:

> "He can build a legislative 'intention' in two steps, by interpreting the record of individual legislators to discover the convictions that would justify what each has done, and then by combining these individual convictions into an overall institutional conviction. Or in one step, by interpreting the record of the legislature itself to discover the convictions that would justify what it has done".[144]

If he were to choose the first strategy, Hercules would need some formula for combining the individual convictions into a group intention: he would have to "combine individual convictions in whatever manner will provide the most plausible set of convictions to attribute to the legislature as a whole".[145] But the first strategy then collapses into the second: "the first (implausible and unmanageable) strategy would fail unless it somehow reached the same result the second reaches directly".[146] So Hercules will choose the second strategy, and interpret the record of the institution and not the records of its members.

Dworkin, then, claims that law as integrity offers a different understanding of interpretation - an understanding according to which the Court may act perfectly legitimately in "going beyond" what the framers intended in interpreting the law they created, while not discarding legislative intention: intention forms the formal structure for the purpose which is at the root of all

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[144] LE, p.336.

[145] *Ibid.*

[146] See LE, p.336 and p.361.

interpretive claims.[147] Hercules must consider the intention of the legislators but as part of the political history of the legislation that his eventual interpretation must fit and explain, just as it must fit and explain the actual text of the statute or treaty provision itself.[148]

However, although Dworkin's approach to intention seems to assume a way of establishing the content of law before subjecting it to questions of integrity, it brings us back once more to the criticisms of Dworkin considered in Chapter Four. There we saw that the tests of fit and justification are criticised by Raz as contradicting the authoritative nature of law, and that both Raz, in his turn, and Dworkin, are criticised by Balkin for not taking into account the perspective from which they approach the law. Before applying Dworkin's program of adjudication, then, these criticisms need to be considered more carefully.

5.4.5 Some qualifications to the 'program of adjudication'

Balkin's criticism of Dworkin and Raz was based on the theory that understanding law entails looking not just to the object - law - but also to the subject - the person dealing with the law. That person can have any number of characteristics and also purposes - for example, applying, interpreting, or obeying the law. We saw in Chapter One that an outsider may have no interest in obeying or understanding the law himself, but is concerned only to establish when the subjects of law will behave in a particular way. A judge, on the other hand, will have a commitment to the legal system which involves taking up the approach to law that Balkin terms 'rational reconstruction', viewing legal materials as having a rational sense and coherence.

Bearing in mind that Raz's criticisms of Dworkin concentrate on Dworkin's claim to be offering a theory of law, not just a theory of adjudication, it is clear

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[147] See LE, pp.58-9.

[148] LE, p.314.

that Dworkin's program of adjudication offers a sophisticated theory of judicial decision-making. It develops the approach of rational reconstruction which a judge, who has a commitment to the legal system within which she or he is working, will necessarily have. A judge cannot regard norms as justified unless they reach some level of coherence and internal rationality. It is also of particular application in the European Union, since it has similarities with the teleological approach which the Court of Justice has already adopted.

However, we saw in Chapter Four how integrity does not fit or justify the political practices of the European Union or Community, and that coherence must eventually give way to political choice, which may put community-wide co-ordination ahead of internal coherence. While an ideal authority may work according to integrity, an authority is justified largely by its ability to achieve social co-ordination (as will be discussed in Chapter Six), whose importance is such that it overrides lack of coherence. As Raz says, we should reject the "premiss that it is unintelligible for people to accept a less coherent body of principles over a more coherent alternative".[149]

Where does this leave the judge? Firstly, it is a grave thing for a judge to be presented with legal materials that contain blatantly inconsistent elements. As we have seen, the judge's perspective will necessarily be one from which the law is to be viewed as far as possible as constituting a rational and coherent whole. This is also part of the judge's duty to apply the law rather than create it. The judge will always be a force for order and integrity in interpreting the law since it is only by the extension of past principles that new and unexpected situations can be dealt with. Faced with a pattern of law-making which manifests too many conflicting principles and past inconsistencies, the judge can no longer extend the materials of the past. An extension of the concept of 'flexibility'

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[149] Raz, *Ethics in the Public Domain*, p.298.

within the Community and Union can only be a challenging scenario for the European Union judge.

Secondly, for Dworkin, integrity is enough: by following integrity, the judge can arrive at the 'right answer', the solution that best fits and justifies the materials before her. However, it is difficult to see how the tests of fit and justification do not dissolve, ultimately, into a choice between competing justifications. This is not to say that judges make law in the manner in which legislatures create law: this is clearly not the case. However, integrity can only take the judge so far. In particularly opaque cases, the judge is ultimately faced with a moral choice: whether to adopt what would have been morally the best outcome had settled law not been imperfect, or follow the program of law as integrity, which may lead to an otherwise less than ideal solution in view of the imperfections and incoherencies of settled law.[150]

At the further reaches of the test of justification in judication, Dworkin falls foul once more of the issue of authority:

> "[Integrity] advocates acting on principles which may never have been considered or approved, either explicitly or implicitly, by any legal authority, and which are inferior to some alternatives in justice and fairness...[This derives] from a desire to see the law, and judicial activities, as based to a larger degree than they are in fact, or should be in morality, on an inner legal logic which is separate from ordinary moral and political considerations of the kind that govern normal government, in all its branches".[151]

Just as it was not appropriate to accept a theory that viewed the political practices of the EU or Community as being based upon integrity, nor is it

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[150] *Ibid.*, p.305.

[151] *Ibid.*, p.325.

appropriate for the judges of the the ECJ to exclude considerations of justice at those points at which a choice between coherence and justice presents itself.

It may be that in an ideal political community, there would be such harmony that adjudication can and should be conducted on the assumption that the law speaks with one voice. However, we have seen that in the European Union, there is such dissonance that on certain issues, the respect for difference must outweigh the desire for unity. Raz again: "In the politics of this imperfect world we know that imposing one voice on the law can be achieved - if at all - only through the imposition of a regime with an inherent tendency to sacrifice justice and fairness, restrict civil rights, and curtail individual freedom".[152]

How then does the conclusion from Chapter Four, that it may be right to prefer the solution which, for example, furthers co-ordination within the group, rather than the solution which is politically most coherent, affect the judge? The most "general point of law", says Dworkin, is to establish why past politics are decisive of present rights.[153] Yet *whose* purposes or point is this? As we have seen, the decision is not guided entirely by the discovery of a 'right' answer, but must rather lie in the sentiments, disposition and purposes of the chooser.[154] It is right that a judge follow the path of Dworkin's program of adjudication as far as she can, but at the deepest levels of the test of justification the program offers a falsely neutral picture of what is worthwhile. Integrity "lacks any articulated concept of the common good...which ought to be promoted as well as respected by those in authority, and for the sake of which others acknowledge that authority".[155]

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[152] *Ibid.*, p.312.

[153] See LE, p.117.

[154] See Finnis, "On Reason and Authority in *Law's Empire*", pp.361-2.

[155] *Ibid.*, p.378.

In the end the test of justification itself may not, while relying solely on integrity, give a clear and unequivocal answer. It must dissolve into a question of justice. As Cornell says, integrity fails without justice: it becomes "either vacuous, because it cannot tell us exactly what the principles are by which we can legitimately reconstruct our historical practice and justify a break with precedent, or is itself dishonest, because it smuggles in a conception of justice but disavows it as essential to its interpretive schemata".[156] Dworkin's account of the relations between fit and justification does not answer the question of what must be done where two or more answers are identifiable which both justify the legal and political materials in an equally accurate way.

From the point of view of the judge, there will not be one clear answer but a variety of incompatible right answers. As Finnis puts it, "in the absence of any metric which could commensurate the different criteria (the dimensions of fit and inherent moral merit), the instruction to 'balance' can legitimately mean no more than bear in mind, conscientiously, all the relevant factors, and *choose*...[T]he truth is that the choice was not *guided by* 'the right answer' but rather *established* it in the sentiments, the dispositions, of the chooser".[157]

Yet the judge is not free to give rein to her own sentiments and dispositions. The judge, Raz suggests, "should simply adopt the most morally sound outcome".[158] This means, in the terminology of Chapter One, giving the judgment that comes as close as she as able to the judgment which a morally sound, practically reasonable person would give in the circumstances. Dworkin's program of adjudication can play a significant role in aiding the judge to go through a process of rational decision-making which greatly raises the chances that the judge will be able to make a judgment which does come close to that

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[156] Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation", p.1173.

[157] Finnis, "On Reason and Authority in *Law's Empire*", p.374 (emphasis in original).

[158] Raz, *Ethics in the Public Domain*, p.313.

'most morally sound outcome'. Although the caveats to 'law as integrity' should be borne in mind, Dworkin's work still has much to offer to the European Union judge. It is on the strength of this conclusion that we may now move on to a more practical application of the way in which Dworkin's theory can be used by those judges.

5.5 Chain novels and soap-operas: *Brasserie du Pêcheur* and *Factortame*

It is not so much the chain novel that is our model for Hercules' European labours as a soap opera, and *Brasserie du Pêcheur* and *Factortame* are perfect examples: they are, after all, "two of the longest-running judicial soap operas in the Community's history".[159] The chain-novel is an ideal case in that it unrealistically assumes that the text with which the novelist is furnished has the unity of something written by a single author. In practice, however, the text "would show the marks of its history",[160] and the interpreter would have to tailor the style of his interpretation accordingly:

> "You must lower your sights (as conscientious writers who join the team of an interminable soap opera might do) by trying to construct an interpretation that fits the bulk of what you take to be artistically most fundamental in the text".[161]

Hercules, 'deciding' *Brasserie du Pêcheur* and *Factortame*, is confronted with an episode in a series of recent cases[162] elaborating and building upon the basic

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159 Oliver, "Note on Cases C-46/93 and C-48/93 (*Brasserie du Pêcheur* and *Factortame*)", p.635.

160 LE, p.237.

161 *Ibid.*

162 Which cases include, for example, Case C-5/94, *R* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd*, [1996] ECR I-2533, and Case C-392/93, *R* v *HM Treasury, ex parte British Telecommunications plc*, [1996] ECR I-1631.

principle of the non-contractual liability of the Member States laid down in *Francovich.*

In 1981 the French brewery Brasserie du Pêcheur SA was forced to stop exporting its beer to the Federal Republic of Germany, as the beer did not comply with the purity requirement in Germany's Law on Beer Duty (Biersteuergesetz, abbreviated to BStG). In the meantime, however, the Commission was investigating this law, believing it to be contrary to what was then Article 30 (now Article 28) of the EC Treaty, which prohibits "quantative restrictions on imports and all measures having equivalent effect" between Member States. The Commission eventually brought an action against the Federal Republic and in 1987 the Court of Justice held that the BStG was incompatible with the then Article 30. Brasserie du Pêcheur was then able to start exporting its beer to Germany once more, but also claimed damages from the German State for the losses it had suffered during the period of exclusion.

Factortame similarly involved a claim for damages, this time against the United Kingdom. The applicants, several companies and individuals, had already come to the Court of Justice twice before[163] in relation to the requirements contained in a new registration system for fishing vessels introduced by the UK's Merchant Shipping Act 1988. The Court found, in an action brought by the Commission, that the nationality requirements of the Act were contrary to EC law.[164] The applicants then claimed compensation from the UK for the losses and expenses they had incurred during the period in which they were unable to fish.

The applicants in both cases relied on the principle laid down in the *Francovich* judgment, that Member States could be liable in damages to individuals who had suffered damage as a result of the State's infringements of Community law.

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[163] Case C-213/89 *Factortame* I [1990] ECR I-2433; Case C-221/89 *Factortame* II [1991] ECR I-3905.

[164] Case C-246/89 Commission v United Kingdom [1991] ECR I-4585.

The national courts, doubtful about the interpretation of this principle, made references to the European Court of Justice for a preliminary ruling under the Article 177 (now 234) procedure. They asked, in essence, whether the applicants were entitled to damages from Germany and from the UK in the particular circumstances of their cases.[165]

A chain novelist must find "some coherent view of character and theme such that a hypothetical single author with that view could have written at least the bulk of the novel so far".[166] Law as integrity requires Hercules, deciding *Brasserie du Pêcheur*, to think of himself as an author in the chain of European Community law. He must find some coherent theory about legal rights to compensation for damage suffered at the hands of Member States who breach EC law such that a single political official with that theory could have reached most of the results the precedents report.[167]

There will be various candidates for the best interpretation of the precedent cases, and Hercules may set out possible interpretations of the Community law relevant to the claims in *Brasserie du Pêcheur*. His initial short list may resemble the following: (1) No one has a moral right to compensation for damage caused by a Member State that has breached an obligation of EC law; (2) People have a moral right to compensation from a Member State that has breached an obligation of EC law, but only if the breach relates to provisions without direct effect; (3) People have a moral right to compensation from a Member State that has breached any obligation of EC law, no matter how minor that breach is; (4) People have a moral right to compensation from a Member State that has breached any obligation of EC law, but only if the breach is serious; (5) People have a moral right to compensation from a Member State which has seriously breached any obligation of EC law, but not in circumstances where recognising

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[165] See [1996] ECR I-1029, pp.1036-7 and pp.1040-1.

[166] LE, p.240.

[167] See LE, p.240.

such a right would impose massive and destructive financial burdens on Member States out of proportion with the breach.

All of these possible interpretations contradict each other: no more than one can figure in a single interpretation of the non-contractual liability of the Member States. (Of course, Hercules may need to construct an interpretation from competitive rather than contradictory principles - that is, "principles that can live together in an overall moral or political theory though they sometimes pull in different directions"[168] - which is a more complex case.)[169] It is also only a very limited list of the contradictory interpretations someone may need to consider: it focuses particularly on the possibility of the nature of the Member State's breach being used as a condition for liability, for example, and ignores issues such as the type of damage, the causal link between breach and damage, Member States' autonomy in the provision of remedies, and all their permutations and combinations.

It does make a great difference which of the five principles he decides provides the best interpretation of the cases. If he settles on (1) or (2) it is clear that he must decide that the applicants are entitled to no compensation; if he settles on (3) he must equally clearly answer that Germany and the UK are in principle liable. The other two require further thought, but the reasoning in each is different. (4) requires a judgment about the seriousness of the Member States' actions, and the criteria with which to judge them, whereas (5) requires a judgment both about the seriousness of the breach and the wider consequences of the financial responsibilities of the Member States.

Hercules will begin testing each interpretation according to its 'fit' with the past cases. He asks "whether a single political official could have given the verdicts of the precedent cases if that official were consciously and coherently enforcing the

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[168] LE, p.241.

[169] Dworkin discusses competing principles in LE, p.241 and pp.271-275.

principles that form the interpretation".[170] Obviously a single political official could not have answered as the Court of Justice did in the Francovich case if he or she were enforcing the principle in (1) that no one has a moral right to compensation for damage caused by a Member State that has breached an obligation of EC law. So Hercules would immediately dismiss interpretation (1), just as the Court did in fact do.[171]

Interpretation (2) was at the basis of the German, Dutch and Irish governments' observations in *Brasserie*. The three governments argued that Community law contains no general principle of state liability, and that the Member States should pay compensation only when there has been an infringement of Community provisions which are not directly effective, as in the case of the provisions of the directive at issue in *Francovich*.[172] On this interpretation of Community law, the Court had decided *Francovich* according to the need to "close a lacuna in the system for the safe-guarding of rights",[173] limiting the non-contractual liability of the Member States to those particular circumstances and precluding compensation in situations such as those in *Brasserie* and *Factortame*.

The Court in *Francovich* defined the non-contractual liability of the Member States as the principle whereby they are obliged to make good loss and damage caused to individuals by "breaches of Community law for which they can be held responsible",[174] not specifying that only breaches of provisions with direct effect gave rise to this obligation. However, the court's decision in Francovich related to a provision with indirect effect only, and Hercules has to cast his net

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[170] LE, p.242.

[171] *Brasserie du Pêcheur*, para. 17 of the judgment.

[172] Observations of the German government (*Brasserie du Pêcheur*, p.1047), of the Irish government (p.1051) and of the Dutch government (p.1052).

[173] Observations of the German government, *Brasserie du Pêcheur* p.1047.

[174] See *Brasserie du Pêcheur*, paras. 35 and 37 of the judgment.

wider in order to decide whether (2) is correct. He will move on to the next stage of his investigation: he will widen the range to include other judicial decisions, decisions in which the interpretive principles of (2) may have been engaged. He will ask, for example, if past decisions distinguish between provisions with indirect and direct effect, as (2) advocates, by providing different protection for people's rights according to whether those rights were conferred directly or indirectly by Community law.

Having asked this question, Hercules would almost certainly agree with Advocate-General Tesauro in *Brasserie* that the principle of the non-contractual liability of the Member States cannot be limited to breaches of provisions of Community law that are only indirectly effective, since to do so would contradict the far more comprehensive protection afforded overall to directly effective rights as opposed to indirect. In widening the range of his investigation Hercules would quickly find that in cases of infringement of directly effective provisions Community law already gives protection and a remedy:[175] indeed, if the Court in Francovich had found that the directive at issue had direct effect, the plaintiffs would have been able to rely upon it before their national courts. As Advocate-General Tesauro says, "it is the *Francovich* situation itself which represents possibly the furthest which the case-law of the Court can go".[176]

So Hercules would come to interpretations (3), (4) and (5), all of which are based on the principle that people have a right to compensation from a Member State that has breached Community law, while disagreeing about the extent of that right. All of these interpretations could have been at the root of the decision in *Francovich*, which does not explicitly discriminate between them. Hercules must now continue to explore the wider context in which these principles have been engaged, asking whether any of the three must be ruled

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[175] Case 26/62, *Van Gend en Loos* v *Nederlands Adminstatie de Belastingen* [1963] ECR 1.

[176] *Brasserie du Pêcheur*, Opinion of the Advocate General, p.1087.

out because it is incompatible with the bulk of legal practice more generally.[177] If he discovers, for example, that past decisions provide that the Community itself must make good damage and loss it causes to people by breaching the law only if there was a deliberate intention to do so, he must rule out (3) unless he can find some principled distinction between the Community and the Member States.[178]

Our European Hercules is thus required "to test his interpretation of any part of the great network of political structures and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole".[179] Although it is an impossible enterprise to fully interpret a community's law at any one time, judges must attempt this Herculean task as far as possible, by "[allowing] the scope of his interpretation to fan out from the cases immediately in point to cases in the same general area and department of law, and then still farther, so far as this seems promising".[180] An experienced judge will in fact have enough of a sense of the context of his immediate problem to be able to distinguish which interpretation of a small set of cases would survive if the range it must fit were expanded.

Interpretation (3) entails an approach to liability which requires compensation by a Member State for any act that is ultra vires per se. In the Community legal system Hercules will look for the principles underlying the conditions on which the acts of governmental entities give rise to an obligation to compensate loss and damage. This search will immediately lead him to the case-law of the Court

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[177] LE, p.245.

[178] See LE, p.245.

[179] LE, p.245.

[180] LE, p.245. Dworkin describes this approach as giving a "local priority" to "departments" of law: for example, if Hercules finds that the accidental damage cases of his community do not distinguish between two interpretive principles, he expands his investigation into, say, contract cases (see LE, pp.250-251).

interpreting Article 288 of the EC Treaty, which provides that the Community itself must pay compensation in the case of its non-contractual liability.

Hercules will be aware that the possibility of linking the tests for the non-contractual liability of the Member States to those already established for the Community has been discussed in academic and judicial circles, with some controversy.[181] However, law as integrity asks him to assume that the law "is structured by a coherent set of principles about justice and fairness and procedural due process",[182] and he has also a duty to apply these principles in fresh cases before him. He will therefore begin from the assumption that (3) is to be ruled out unless it is applied as a principle also in the case-law on the non-contractual liability of the Community; that is, unless there is another principle that would enable him to differentiate between the Community and the Member States in this case.

The case-law on the non-contractual liability of the Community rejects a strict liability test such as (3) and instead requires tests which limit liability. Hercules must then confront the arguments that the rejection of (3) in relation to the Community should not be accepted for the Member States: arguments, for example, which claim that the types of Community action which breach EC law are unlike the types of Member State action in that the Community has to make complex discretionary choices regarding economic policy.[183] If he finds that these arguments do not justify the damage that would be done to integrity by introducing contradictory principles, he must reject (3).

If he does reject (3), he must tackle interpretations (4) and (5), which both argue that the liability of the Member States must be limited, (5) according to

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[181] See Craig, "Once More Unto the Breach: The Community, the State and Damages Liability", pp.78-79.

[182] LE, p.243.

[183] Craig, "Once More Unto the Breach: The Community, the State and Damages Liability", p.81.

the seriousness of the breach, while (6), on the contrary, according to the burden liability could place on the Member State responsible. (5) suggests that liability might be unlimited in amount, as long as the breach is serious, while (6) limits liability precisely because of the frightening sums it might otherwise reach.[184]

The necessity to balance the competing interests of the individual who has suffered loss at the hands of a Member State and the public interest in the Member State being free to make difficult legislative choices unencumbered by the risk of burdensome claims for damages is clear from Hercules' immediate circle of reference. Community law evidently limits in various ways the potential liability of public bodies, but Hercules will most probably need to widen his search once more in order to assess (4) and (5). His widening circle of fit will encompass also the law of the Member States: the case-law on the non-contractual liability of the Community has been developed by the Court according to the rule in Article 288 itself that non-contractual liability be based on the "general principles common to the laws of the Member States". If Hercules finds that one of the two interpretations is consistently contradicted, he must reject it.

Suppose, however, that he finds a mixed pattern. He may find, for example, that agricultural producers who have claimed for damages against the community have in some cases been denied compensation, apparently because the Court was concerned not to impose too heavy a burden of liability upon the Community, while in others the finding of a serious breach was not limited by concerns about the consequences. Hercules must attempt to balance the weight of the cases engaging each principle against each other - not merely numerically, but also by assessing the relative importance and reach of the decisions.

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[184] See Dworkin, LE, pp.246ff, where he discusses comparable interpretations of tort liability in emotional injury cases.

Hercules' examination of fit may still not furnish him with an answer; he may find himself with such a mixed record that he is unable to judge which of interpretations (4) and (5) best fits the law of the Community. It is at this point that he must move questions of fit behind and move on to justification. Either the Community enforces the principle of 'serious breach' as its test of liability, but has often lapsed, or it applies the principle of 'serious breach' limited by some overall ceiling on liability - although, again, it has often lapsed from it. Which shows the Community "in a better light, all things considered, from the standpoint of political morality"?[185]

The answer Hercules gives to this question depends on his convictions about justice and fairness. As Dworkin puts it:

> "It will depend, that is, not only on his beliefs about which of these principles is superior as a matter of abstract justice but also about which should be followed, as a matter of political fairness, in a community whose members have the moral convictions his fellow citizens have".[186]

For example, Hercules may think one of the two interpretations better on grounds of abstract justice, but know that this is a radical view in that it is "not shared by any substantial proportion of the public and unknown in the political and moral rhetoric of the times".[187] Hercules must balance the opinions of the community and the demands, as he sees them, of abstract justice, all within the context of the circumstances of the case.

Dworkin argues that Hercules is not here making a fresh, 'clean-slate' decision about what the law is according to his own view of what the law ought to be.[188] This is correct even in the light of the qualifications to Dworkin's theory

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185 LE, p.249.

186 *Ibid.*

187 *Ibid.*

188 See Dworkin, *A Matter of Principle*, p.161, and LE, pp.260-261.

discussed above. Hercules must bring political morality to the heart of his decisions about law,[189] but he cannot judge the law on the non-contractual liability of the Member States as expressing a particular principle or interpretation, however much that principle appeals to him personally, unless he finds it consistent in principle with the structural design of non-contractual liability and the Treaties as a whole, and also with the dominant lines of past interpretation by Community judges.[190] The constraint on Hercules becomes clear if we return once more to the allegory of the chain novel. Neither of two crude descriptions, of total creative freedom, or of mechanical textual constraint, captures the position of the chain novelist:

> "You will sense creative freedom when you compare your task with some relatively more mechanical one, like direct translation of a text into a foreign language. But you will sense constraint when you compare it with some relatively less guided one, like beginning a new novel of your own".[191]

In deciding *Brasserie du Pêcheur* Hercules is therefore ultimately constrained not by "external hard fact or...interpersonal consensus",[192] but is, rather, subject to "the structural constraint of different kinds of principle within a system of principle, and it is none the less genuine for that".[193]

5.6 Legitimacy in law and legitimacy in politics

How is this 'system of principle' to be understood, however? Pescatore has said that the judges of the European Court of Justice have "une certaine idée de

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189 This will be particularly so in the case of constitutional decisions. See Dworkin's defence of "the moral reading", the way he advocates for reading and enforcing a political constitution, in *Freedom's Law*, Introduction (pp.1-38).

190 See Dworkin, *Freedom's Law*, p.10, and LE, p.258.

191 LE, p.234.

192 LE, p.257.

193 *Ibid.*

l'Europe" of their own.[194] The extent to which the judges of the Court of Justice will find Dworkin's theory of *law* as integrity useful in deciding cases and interpreting EC law depends on the 'certain idea' of the European Community that they hold. We have already seen, for example, that the European Union does not unequivocally embrace the principle of integrity in its *political* life.

Dworkin's theory is based on a view of law which regards it primarily as the expression of values which derive from the life and practices of the community to which it belongs. As he says, we should understand law as "flowing from the community's present commitment to a background scheme of political morality",[195] while law as integrity requires an interpretation of contemporary legal practice "seen as an unfolding political narrative".[196] The law, as the manifestation of authority, cannot be correctly applied by the judge without some concept of the way in which the authority of the legal system and thus her own authority can be rationally and morally exercised.

However, I argued in Chapter Four that the recent extension of the concept of flexibility into the European Union shows that integrity is not given the same value within the Union as Dworkin, with his 'community of principle', would expect. Up to now the judges of the Court of Justice have treated the European Community as a legal order in which coherence and integrity are paramount: the teleological method of reasoning is emblematic of a technique which extrapolates particular decisions from a 'background scheme of political morality'. Where, as now, that background scheme is fractured by a clear preference for co-operation which, although it is exercised within certain defined limits, expressly contradicts integrity, all European judges should be aware that European law must be interpreted in accordance with this preference.

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[194] Pescatore, "The Doctrine of Direct Effect: An Infant Disease of Community Law", p.157.

[195] LE, p.346.

The difficulty facing all judges who are faced with the interpretation of the law of the European Union is that the various authorities at the source of that law are not clearly defined or justified. The theme running through this chapter has been legitimacy - the justification of the authority of judges within the European Union. That theme will be continued into the next chapter, which asks upon what grounds the authority wielded over the citizens of the European Union can be said to be legitimate.

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[196] LE, p.225.

Chapter Six

The Union

Introduction

In this, the last chapter of the thesis, I return to that crucial question: the legitimacy of the European Union. I argue that the basis of a political authority, and the basis of the authority of the Union, should be a task; that no political authority, including the authority of a state, can be justified as an end in itself but only according to its capacity to resolve co-ordination problems and to realise the greater good within a community. I argue that the sceptical point of view, which suggests that legitimacy is a mere myth, is ultimately a dead-end. More risky but more fruitful is having the courage to think big, be idealistic, and think about the ways in which our communities and our own participation within them may realise the potential for good of human co-operation.

In Chapter Four I distinguished three conceptual ways in which authority may be justified. These three types of legitimacy I termed social, legal and normative justifications of authority. Social legitimacy relates to the efficacy of a system of governance - the actual acceptance it receives amongst the governed. Legal

legitimacy was defined as arising from the system of governance being constituted in accordance with law. Normative justification, lastly, refers to the conditions under which an authority may be regarded as legitimate. I noted the way in which normative legitimacy plays a part in both social and legal legitimacy, and I offered a lightning sketch of normative political authority in the EU as containing elements of democracy and concern for the general welfare. However, the chapter then had to set aside the question of the form that a normative justification for the legal and political authority of the European Union might take, in order to consider the question of the various perspectives from which legitimacy might be viewed. This chapter therefore returns to the question of the normative justification of authority in the EU.

Once I have set the scene with a brief survey of some of the most interesting and original approaches to the normative justification of authority in the Union, I will divide justifications of authority into four categories: authority justified through its accomplishment of a task; authority justified through myth; authority justified by its adherence to particular values; and authority justified by its exercise in accordance with the consent of the governed. For convenience these four categories of justification shall be termed task, participation, community and myth. I make no claim to attempt linear arguments here. Instead I shall explore each justification using a particular theory as a springboard - Finnis on task, Schlag and Derrida on myth, and Dworkin on community and participation.

6.1 The normative justification of authority in the European Union

The question of the normative justification of authority in the EU has rarely been posed explicitly in the literature. One exception is an article by Weiler, Haltern and Mayer in which the authors ask: "By what authority, if any - in the vocabulary of normative political theory - can the claim of European law to be both constitutionally superior and with immediate effect in the polity be

sustained?".[1] They go on to warn that this is "a dramatic question, since constitutionalisation has taken place and to give a negative answer would be subversive. One can, it seems, proclaim a profound democracy deficit and yet insist at the same time on the importance of accepting the supremacy of Union law".[2]

As the reference to the process of constitutionalisation shows, the question of legitimacy in the EU has undergone a sea-change in the years of the European Community's existence. Mancini and Keeling point out that the debate about the democratic deficit in the European Union ignores one fundamental fact: that the European Community was originally never intended to be a democratic organisation.[3] They point to the preamble and the first part of the Treaty of Rome (in which the word 'democracy' does not appear) and to the guiding principles of the original 'constitution'. Tracing the historical evolution of the European Communities, Wallace and Smith argue that "all those engaged in the processes of European integration accepted that the *eventual legitimation* of European union would have to rest on popular consent...[although they] differed..over how that consent should be registered, and *over what time-scale it should be sought*".[4] European integration started as an "elite process" to which the questions of legitimacy and justification, hitherto considered within the context of the study of the modern State, simply did not appear to apply.

As the European Union's competences have expanded and its reach lengthened into ever increasing spheres of activity, the issue of legitimacy has taken on greater urgency. However, discussions of the possible bases of legitimacy are often muddled; one common mistake, for example, is to confuse the way in

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[1] Weiler, Haltern and Mayer, "European Democracy and its Critique", p.10.

[2] *Ibid.*

[3] Mancini and Keeling, "Democracy and the European Court of Justice", p.175.

[4] Wallace and Smith, "Democracy or Technocracy? European Integration and the Problem of Popular Consent", p.144 (emphasis added).

which authority is exercised within the EU (various models of governance are proposed in this respect) and question of the legitimacy of that authority (the conditions under which those models may be justified). Models of governance, while constituting a crucial step in identifying the nature of the authority that must be justified, are not normative justifications of authority in themselves but simply offer descriptions and analyses of that authority.

I shall not give a detailed survey of the literature focussing on the legitimacy of the EU. However, in order briefly to set the scene I will turn to four examples of work where reflections on the question of the legitimacy of the European Union have gone further than a characterisation of the European polity. Firstly, Weiler, Haltern and Mayer take well-known models of governance and attempt to fit particular forms of accountability to those models.[5] Secondly, Joerges considers specifically justificatory models as possible answers to the 'Community legitimacy problem'.[6] Thirdly, MacCormick presents his analysis of the European Union as a mixed commonwealth containing a 'reasonable element' of democratic rule.[7] Fourthly, Craig suggests that a republican model of democracy provides a basis on which to build upon the operation of democracy within the sphere of the Community.[8]

Three approaches to European governance and legitimacy have, according to Weiler, Haltern and Mayer, become most prominent.[9] They are termed intergovernmentalism, supranationalism and infranationalism. Intergovernmentalism is typified by the work of Andrew Moravscik, who claims that the EC can be analysed as "a successful intergovernmental regime

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[5] Weiler, Haltern and Mayer, *op. cit.*

[6] Joerges, "European Economic Law, the Nation-State and the Maastricht Treaty".

[7] MacCormick, "Democracy, Subsidiarity and Citizenship in the 'European Commonwealth'".

[8] Craig, "Democracy and Rule-making Within the EC: An Empirical and Normative Assessment".

[9] Weiler, Haltern and Mayer, *op. cit.*, p.24ff.

designed to manage economic interdependence through negotiated policy co-ordination".[10] As this claim shows, the Member States are the key players in this model. By contrast, the supranational model, found particularly in Weiler's work, emphasises the existence of the independent institutions and structures of the Union.[11] The third approach, infranationalism, views the EU as a forum in which interaction takes place at every level and where politics and ideology take second place to such factors as technical expertise and economic interests.[12]

Weiler, Haltern and Mayer then go on to attempt to match up these three models with models of 'democratic theory'. They suggest that infranationalism shares common features with the neo-corporatist model of democracy, that the supranational mode of governance may be analysed with reference to 'competitive elites' models, and that intergovernmentalism may be an example of the 'consociational' power-sharing model, at least in relation to certain areas of Union governance. In identifying the 'democratic problems' inherent in the models of democratic theory, they are identifying the problems inherent in the models of governance associated with them.

Unfortunately, although the authors claim that the models of democracy justify the models of governance, the reasons why this is so are not spelled out. For example, they claim that if, as they suggest, the intergovernmental model were consociational, "this would be a justification not from an efficiency and stability perspective but from a normative representational one as well".[13] Clearly they are assuming that authority may be justified according to the stability it creates

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[10] Moravscik, "Preferences and Power in the EC: A Liberal Intergovernmentalist Approach", p.474.

[11] See, for example, Weiler, "The Community System: The Dual Character of Supranationalism".

[12] See, for example, Majone, "The Development of Social Regulation in the European Community".

[13] Weiler, Haltern and Mayer, *op. cit.*, p.31. On the relationship between the consociational model and legitimacy see further Chryssochoou, "Democracy and Symbiosis in the European Union: Towards a Confederal Consociation?", p.6ff.

and the level of efficiency with which it undertakes its task, but there is no discussion as to how these may be weighed up against the 'anti-justificatory' effects of the consociational model, such as its tendency to focus power in the hands of elites, to favour the social status quo, and to undermine the ability of the individual citizen to influence decision-making.[14] The consociational model as they present it is, for example, far more focused upon a descriptive analysis of the way in which power is wielded by groups of elites than upon the conditions under which the model may confer legitimacy upon the form of authority it describes or advocates.

Christian Joerges similarly presents three theories of the EC legal order, and explicitly draws out the mode of justification that each assumes. Weiler's suprationational model features in his list, which also includes the neo-liberal tradition ('Ordnungstheorie') which interprets the EC Treaty as an 'economic constitution', and the theory which identifies the communities as 'special purpose associations of functional integration'. Interpreted as an economic order, the justification for the authority of the European legal system is said to be its nature as an order constituted by law, and its commitment to economic freedoms; these two elements protect it from attacks "based upon democracy theory or constitutional policy".[15] The justification for the EC's authority as a special purpose association, by contrast, is its ability to achieve certain functions that are best assigned to a supranational bureaucracy.[16]

The 'order constituted by law' justification is not what I termed a normative justification: it falls squarely within the category of legal justification described earlier. The notion that authority may be legitimate because of its commitment to economic freedoms, on the other hand, bases itself on the assumption that an authority may be legitimate because it promotes and is committed to certain

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[14] *Ibid.*

[15] Joerges, "European Economic Law, the Nation-State and the Maastricht Treaty", p.38.

[16] *Ibid.*, p.39.

values. This approach to justification also arises frequently in writings discussing the possibility or existence of a constitution for the EU: for example, the 'main foundation' for democratic legitimization in the EU is said to be the protection of human rights and individual liberties,[17] or the commitment to equal treatment of individuals.[18] The justification for the model of the EC as being the achievement of certain functions is an example of another common type of normative justification: that an authority may be justified by its capacity to undertake specific tasks. Thus, for example, the Community is said to be legitimised by its ability to create open markets and undistorted competition,[19] or to secure stability, continuity and peace.[20]

While the intergovernmental, infranational, neo-liberal and special purpose concepts only recognise supranational structures which cannot and need not be legitimised by any notion of democratic governance, Weiler's supranational model is significantly different: the dependence of the Union order upon intergovernmental co-operation and consensus is not the defining attribute of the EU but the price to be paid for acceptance of the Union regimes by the Member States and their electorates. For the supranational conception, it is thus democracy that is and should be the basis of legitimacy of authority in the EU.

Democracy is also the focus of MacCormick's consideration of the legitimacy of Community law. His work is original in that, as opposed to the above authors' use of "off-the-peg democratic wares",[21] he chooses the 'ambitious course' they decline and takes steps towards fashioning a tailor-made democratic theory for the Union. Having established that the European Union is a commonwealth, in

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[17] Hauser and Müller, "Legitimacy: The Missing Link for Explaining EU-Institution Building", p.25.

[18] Petersmann, "Constitutionalism, Constitutional Law and European Integration".

[19] Mestmäcker, "On the Legitimacy of European Law".

[20] Elefitheriadis, "Aspects of European Constitutionalism".

[21] Weiler, Haltern and Mayer, *op. cit.*, p.28.

the sense that it comprises "a group of people to whom can reasonably be imputed some consciousness that they have a 'common weal'",[22] he turns to the democracy (legitimacy) of that commonwealth. He begins by clarifying the question: "the issue about Europe ought not...to be whether it is totally or completely democratic, but whether it is adequately so given the kind of entity we take it to be".[23]

MacCormick argues that the Union has a constitution which contains different elements and manifestations of democracy. It contains oligo-bureaucratic elements, in that a few rule over the many, but these elements are also subject to democratic controls, either through a form of direct representative democracy or through indirect representative democracy. He argues that while this is "by no means democracy perfect or democracy complete...it is not a system wholly lacking in democratic elements or democratic spirit".[24] He concludes, therefore, that it is a case of what he terms a 'mixed constitution' - mixed both as to constitutional types and normative sources.

MacCormick's work is instructive since the loud calls for 'more democracy' in the EU are rarely accompanied by any recognition that democracy may appear in many guises other than State-oriented models, and that consideration must be given to the combination of elements that may justify the nature of authority as exercised in the EU. 'More democracy' in the EU could take the form of, amongst many other suggestions, enhanced participation in decision-making for Union citizens, procedural safeguards on power, transparency, and subsidiarity. A blanket application of the model of democracy we may be accustomed to in our own or any other Member State is clearly inappropriate for a polity in

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[22] MacCormick, "Democracy, Subsidiarity and Citizenship in the 'European Commonwealth'", p.341.

[23] *Ibid.*

[24] *Ibid.*, p.344.

which the authority that should be legitimated may itself alter from one sphere of competence to another.

Weiler, Haltern and Mayer's analysis of governance in the EU is based upon this belief - that authority in the EU manifests itself in different ways which therefore may (and should) be justified accordingly. Craig, the last author I will present, accepts their tri-partite division of theories of governance and builds upon the thesis that different models of democracy may best capture different aspects of the operation of the EU. He hives off what Weiler terms the supranational aspects of the Community, "which covers the basic structure of political authority and the making of primary laws within the EC itself",[25] and addresses himself to justification of these alone. The 'normative model of democracy' which he argues best fits the empirical data is a form of republicanism which includes the twin elements of institutional balance and the premise that democratic deliberation should be designed to achieve the public interest rather than narrow sectional desires.[26] What I wish to draw from Craig's work is firstly the emphasis on the need to clearly identify the sphere of governance and authority that is being justified, and secondly his general approach which, like MacCormick's, is to side-step labels such as 'federal' or 'constitution' and instead to consider the elements of justification that may be applicable to the unique combination of types of authority to be found within the EU.

These four views demonstrate, I hope, the difficulty inherent in tackling an entity such as the Union with tools which have been fashioned in order to understand the ethno-national state. This difficulty is exacerbated by the tendency to *assume* that the nation state is legitimate and to equate 'the state' with justified community authority. Weiler argues that the "abuse of the

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[25] Craig, "Democracy and Rule-making Within the EC: An Empirical and Normative Assessment", p.106.

[26] *Ibid.*, p.113.

boundary between nation and state is most egregious when the state comes to be seen not as instrumental for individuals and society to realize their potentials but as an end in itself".[27] MacCormick's argument, that we should first decide what kind of entity our political community *is* before assessing whether or not it is democratic, holds good for the Member States and not just for the Union.

In his recent work MacCormick also introduces a four-part distinction which may clarify the approach taken in this thesis to the questions of system, authority and legitimacy. He writes that the relationship between law, as an institutional normative order, and politics, as an order of power, has been understood in four particular ways: (i) that the state is a creation of law; (ii) that the state is a producer of law; (iii) that the state is coexistent with law but not identical with it; and (iv) that state and law are essentially identical, being the same object viewed differently.[28]

The first possibility is usually given the label of 'natural law': it is the Lockean view that even in a 'state of nature' - outside any form of political organisation – people would have rights and owe each other corresponding obligations. On this view state institutions will be legitimate if they fulfil conditions which are perceived as anterior to the state itself. The second thesis is the Hobbesian counter-argument: that the only rights humans can have are the rights that governments confer upon them. The third view is based on the argument that the first two take no account of the evolution of society, state and law. MacCormick puts it thus: "the tendency to establish monopoly over law should not blind us to the deeper underlying reality, of law rooted in the usages and practices of humans in social coexistence".[29] The fourth is epitomised by Kelsen's work on law and state: the state is the territorial legal order personified.

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[27] Weiler, *The Constitution of Europe – Do the New Clothes have an Emperor?*, p.249.

[28] MacCormick, *Questioning Sovereignty*, p.18.

[29] *Ibid.*, pp.20-21.

It is the fourth view which was taken up in Chapters Two and Three of this thesis, which attempt to demonstrate that legal validity and the idea that authority can be established legally take us only part of the way toward understanding legitimacy as justified authority. The application of Kelsen's theory helped us clarify the issues; but, as MacCormick comments, "at the interface of law and politics, Kelsen's austerity is unproductive".[30]

MacCormick himself adopts the third thesis: he explicitly sets his work on Europe within his theory of law as institutional normative order.[31] The approach I wish to focus on in this chapter probably comes closest to the first and it is the work of a natural lawyer – John Finnis – which is at the root of this chapter's argument that authority should be justified by its achievement of a task.

6.2 Task

Hauser and Müller claim that the original justification of the Union was "the containment of communism and the safeguarding of peace between France and Germany",[32] a role of which little remains today. However, a legitimation for authority within the Union based upon its ability to fulfil particular tasks is still a recurring theme in the literature. Hrbek argues that due to growing interdependence the nation state has lost its ability to properly solve problems and respond to the demands of its citizens.[33] He suggests that a component of legitimacy in the EU is the existence of tasks and functions "which can only be solved and performed efficiently and convincingly with the help of the EU".[34]

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[30] *Ibid.*, p.23.

[31] See, for example, the preface to *Questioning Sovereignty*.

[32] Hauser and Müller, "Legitimacy: The Missing Link for Explaining EU-Institution Building", p.17.

[33] Hrbek, "Federal Balance and the Problem of Democratic Legitimacy in the EU", p.47.

[34] *Ibid.*, p.65.

Out of three of Weiler's 'visions' of the way the Community might develop in the future, two are based on a task-led justification. The first vision conceptualises the Community as a "technological instrument, an agency, for the resolution of post-industrial problems such as environmental protection, transnational trade, transport and the like which transcend national boundaries".[35] The second envisages the Community as finding its 'prime historical mission' in its responsibility towards Eastern Europe, providing structures for peace, prosperity and a 'supranational ethos' which would "blunt the excesses of nationalism run amok".[36]

However, others question the extent to which task-based justifications can confer legitimacy upon the Union. Hauser and Müller argue that "legitimization by results...may be an important factor of short term political stability, but it would be a weak foundation for developing the EU into a federal structure".[37] Joerges agrees, commenting that a closer look at suggestions such as those of Hrbek reveals the "normative (and factual!) limits of such purely functional arguments".[38] Legislative policy, he says, cannot be simply functional; "it remains tied to the legal systems of the Member States and must respect the standards of justice which have won recognition in them".[39] Weale goes further: functional capacity "may be necessary for legitimacy but...cannot be sufficient".[40]

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[35] Weiler, "Europe after Maastricht - Supranationalism, Nationalism and the State", p.329.

[36] *Ibid.*, p.330.

[37] Hauser and Müller, "Legitimacy: The Missing Link for Explaining EU-Institution Building", p.24.

[38] Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective", p.391.

[39] Joerges, "Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration", p.127.

[40] Weale, "Democratic Legitimacy and the Constitution of Europe", p.89.

These objections are correct in that they highlight the limitations of the idea that the Union may be justified by its capacity to complete specific tasks. However, those who propose that the justification of the Union may be based on 'task' are on the right track; they are simply not ambitious enough in their claims about what those tasks or that task may be. The ground of any sort of authority is most often a task.[41] Authority arises from the necessity of a task whose performance requires a certain sort and extent of obedience on the part of those for whom the task is supposed to be done.[42] The right to rule (whether in a state which is a member of the EU, or in the EU itself) can only arise from the need to be ruled, a need arising from the needs of the community and its members and in the community's interest in pursuing the common good. Authority, then, wherever and in whoever it is situated, is only legitimate to the extent that it serves those needs and interests.[43]

Therefore the achievement of one task, however great or small, such as greater material prosperity for the members of the European Union, plays a part in the legitimacy of the Union insofar as it falls within the wider task of securing the best life possible for all those people who constitute it. This can be the only foundation for normatively legitimate authority. Other elements will be just that - elements which may be necessary but are not sufficient. Consent, for example, is not enough, since consent can justify authority only up to a certain limit: unlimited authority is never legitimate.[44]

Authority, exercised through law, has the function of solving co-ordination problems. Whenever people come together in a group, there are only two ways of co-ordinating their common action: unanimity or authority. We see

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[41] There are types of authority which have other bases, such as the authority of an expert, but these are minor incidences of authority. See Raz, *Authority*, pp.2-3.

[42] Anscombe, "On the Source of the Authority of the State", p.147.

[43] See Raz, *Authority*, p.5.

[44] Raz, *Authority*, p.12.

unanimity in the operation of international law, for example, where an exchange of promises is made by treaty. But where there is no unanimity about the desirability of respective schemes, the final selection between those alternatives must be treated by the parties as authoritative in order that the group may move beyond the impasse. The ultimate basis of a ruler's authority is, then, "the fact that he has the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to a community's co-ordination problems".[45]

The concept of co-ordination problems is to be distinguished from the game-theoretical concept of co-ordination problems and their solutions. Finnis explains that there are various differences between the concept of co-ordination problem used by himself and others in relation to political and legal philosophy, and that used in game theory. Co-ordination problems as he understands them are "neither more nor less than the 'problems of united action' (i.e., 'common action' for the 'common good')".[46] Finnis also argues that while it is correct to explain authority in terms of what is needed for securing human good, it is wrong to treat the human good as producible, as if it were a bridge or omelette that could be made or completed.[47] An authority is not following a route to a definite goal; it must order a society "for the greater participation of its members in human values".[48]

What is the 'common good'? Finnis defines it as follows: "the common good simply is the good of individuals living together and depending upon one another in ways that tend to favour the well-being of each".[49] Thus ultimately

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[45] Finnis, *Natural Law and Natural Rights*, p.351.

[46] Finnis, "Law as Co-ordination", p.100. See also Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory", pp.124-133 for a discussion of game theory and social choice theory and their relation to legal and political theory.

[47] Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory", p.121.

[48] Finnis, *Natural Law and Natural Rights*, p.280.

[49] Finnis, "Law as Co-ordination", p.103.

all the arguments for legitimacy which might be proposed in relation to the European Union – democracy, protection of human rights, community - only have value to the extent to which they figure in the answer that might be given to the question: what, in the European Union, is the common good? This question can only be answered using what Finnis terms practical reasonableness, and from the perspective of the person who *is* practically reasonable.

Balkin, the chosen critic of Chapter Four, dismisses the 'ideal observer' approach as a 'misguided' attempt to avoid problems of subjectivity in rational reconstruction. His argument is that 'ideal observer theory' (which I am assuming would include Finnis' central case of the practically reasonable perspective) fails to grasp the nature of legal knowledge because it attempts to empty the subject.[50] The appeal and conviction of Finnis' conception of the perspective of the practically reasonable person, however, lies in the fact that it does precisely the opposite. It is the mature as opposed to the underdeveloped, the flourishing rather than the corrupt, the full rather than the empty.[51]

If from the practically reasonable perspective the common good of political community is, as Finnis suggests, "the securing of material and other conditions which favour the realization by each individual...of his or her personal development",[52] how does the European Union match up? It is tempting simply to note that the legitimacy of the Union depends on the extent to which it furthers the common good of its citizens and leave it at that; however, having concluded that all other arguments are worthwhile only insofar as they play a part in the common good, I shall attempt to make a few comments on what, from this perspective, will contribute to the Union's legitimacy.

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[50] Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence", pp.142-3.

[51] Finnis, *Natural Law and Natural Rights*, pp.10-11.

[52] Finnis, *Natural Law and Natural Rights*, p.154.

Firstly, it is important to spell out that the constitutional models of governance, democratic structures, constitutional principles and all the trappings of individual Member States are affected just as much by the existence of authority at the Union level as their own authority affects the Union. The Member States are not inherently legitimate. The authority of the Member States is justified only to the extent that the holders of that authority ensure that their citizens' well-being is promoted by Union authorities, not only through national means of co-ordination. The different authorities within the Union and Member States must co-operate in seeking the common good of all those subject to their combined power. Thus, for example, Italy's failure to promote consultation of the Italian parliament on issues of EC law affects the legitimacy of the authorities at both the national and European level.[53]

Secondly, since authority in the Union and Member States is now fragmented, law takes on an even more important role. We saw that there are two ways of legitimately co-ordinating action in a group: either by unanimity, or by authority. Where there is something approaching unanimity as to the scheme of co-ordination to choose, the authoritativeness of the eventual choice is less important, since there is already the will to act together. Where, however, there is great diversity of values and opinions, the authority of the choice is crucial, since co-ordination is conditional upon the choice being accepted as binding. Ladeur argues that the process of 'pluralisation and fragmentation' in the Union has resulted in law losing its 'central importance'.[54] Quite the opposite is true. Where there is a lack of consensus, clear and binding rules offer a neutral tool to build structures of compromise: the authority of law brings the possibility of co-ordination out of conflicting values and interests. This, to return to the previous chapter, also has implications for the decisions of Union judges, who

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[53] See Cartabia, "Il pluralismo istituzionale come forma della democrazia sovranazionale", pp.217-8.

[54] Ladeur, "Towards a Legal Theory of Supranationality: The Viability of the Network Concept", pp.33 and 45.

should not impose one voice where the law chooses to respect difference rather than force unity.

Thirdly, the practically reasonable perspective offers a point from which to evaluate propositions for justification of the authority of the Union. Weiler's visions of a European Union as 'unity' or 'community', for example, must be measured against the yardstick of the common good. Calls for increased democracy must be considered in relation to the contribution to the general well-being made by the different ways in which individuals can exercise some control over the decisions that affect them. The test has changed from resemblance to state-like models of political organisation to resemblance to the central case of a polity in which justice is secured for all.

I will shortly move on to those propositions for the justification of the authority of the Union. However, let us remember at which point we find ourselves: we have ripped up the roots, we are are looking at that point where detachment can aid us no longer, where Kelsen's theory demonstrated that we have to *choose* our point of view. I cannot fairly choose practical reasonableness without balancing the picture of legitimacy I am drawing by considering the other end of the spectrum from the practically reasonable point of view: the sceptical perspective.

6.3 Myth

Let us remind ourselves once more exactly what is at stake when we consider the authority and legitimacy of the European Union. Notwithstanding the fact that it does not match familiar models and structures of centralised authority, it is clearly what Anscombe terms a 'civil authority'. In order to understand this, we must distinguish there being a government which exercises civil authority from two contrasting things: firstly, large-scale voluntary co-operative associations, and secondly, control by bandits - "a smooth sophisticated

Mafia".[55] Civil authority is distinguished from the first by government's exercise of coercive force, and *if* it is distinguished from the second, it is by government's authority in the command of violence,[56] which authority is usually exemplified by the association of that government with a system of administration of justice.[57]

"Since a distinctive thing about civil government, as opposed to people's having dominant positions in common enterprises, is actual or threatened violence, it is either an evil or a necessity based on evil".[58] The fact that cooperative enterprises and procedures may be needed for the enhancement of life does not alter this; if there were no evil, there would not be authority but a voluntary association run by unanimity. "If someone holds in a sufficiently radical fashion that government is a refined and grandiose banditry, it is hardly possible to convince him of error...No political theory can be worth a jot, that does not acknowledge the violence of the state, or face the problem of distinguishing between states and syndicates".[59]

Derrida further separates out two elements of the coercion inherent in any civil government. There is not only the violence that maintains, conserves, confirms and insures the permanence and enforceability of law, but also the founding violence of law.[60] This founding violence is "the originary violence that must have established this authority and that could not itself have been authorized by any anterior legitimacy, so that, in this initial moment, it is neither legal or illegal".[61] Thus law is always authorised force, "a force that justifies itself or is

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[55] Anscombe, "On the Source of the Authority of the State", p.143.

[56] *Ibid.*, p.144.

[57] *Ibid.*, p.171.

[58] *Ibid.*, p.148.

[59] *Ibid.*, p.149.

[60] Derrida, "Force of Law: The Mystical Foundation of Authority", p.31.

[61] *Ibid.*, p.6.

justified in applying itself, even if this justification may be judged from elsewhere to be unjust or unjustifiable".[62]

In Chapter Two I tried to show that the detached normative perspective of the Kelsenian legal scientist brings us to the apex of the legal system, the Grundnorm, but can take us no further. Kelsen's explicit adoption of the detached normative point of view disavows any claim to offer an account of the normative legitimacy of the legal system it describes: it limits itself purely to the legal validity of the laws of a political community. The Grundnorm was explained, in Chapter Two, to be what Kelsen termed a 'fiction' - a construct which is of service to discursive thought. We have now returned to that point: that place at which the detached normative perspective must posit the Grundnorm is where, from the critical point of view, the foundation and normative justification of authority which underpins the efficacy (social legitimacy) and validity (legal legitimacy) of a civil authority is to be found.

It is at this point where the categories of argument I have been considering come into play; and at which, for writers such as Derrida, is found nothing more substantial than myth:

> "Since the origin of authority, the foundation or ground, the position of the law can't by definition rest on anything but themselves, they are themselves a violence without ground. Which is not to say that they are in themselves unjust, in the sense of 'illegal'. They are neither legal or illegal in their founding moment".[63]

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[62] *Ibid.*, p.5.

[63] Derrida, "Force of Law: The Mystical Foundation of Authority", p.14.

The founding and justifying moment that institutes law has a 'performative force' that is itself the 'mystical limit': law's ultimate foundation is by definition unfounded.[64]

The answer to the question of law's ultimate foundation will depend upon the subject responding. Later on we will see Dworkin's answer: authority is justified if the community is a principled community that satisfies the conditions of moral membership. We have seen other answers, such as the functional theory according to which European law is understood as a legal order committed to economic freedoms and market building. Let us look now at Schlag's argument that theories such as these are the product of particular types of legal thought which are "conceptually, rhetorically, and socially constituted to avoid confronting the question of who or what thinks or produces law".[65] They fall foul of the 'problem of the subject'.

I would suggest that models such as the functional theory of European law are prone to the same recurring flaw as the type of legal thought that Schlag calls 'Langdellian formalism'. Any meaning is located in the law itself; "[law] is stable, self-identical, foundationally secure and bounded; it is, in other words, just like an object". And once meaning has been located in the 'transcendental order of the object', "the individual subject emerges only as a potential threat...[T]he individual subject often features as the misguided 'activist' judge who derails the law by imposing his 'own personal values'".[66] We can see this taking place in the language used to describe European law: it is the *legal order* that is committed to market-building; it is the *legal order* that is justified by its adherence to particular values. The law itself is operating as the subject: in this kind of

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[64] *Ibid.*, pp.13-14.

[65] Schlag, "The Problem of the Subject", p.1629.

[66] *Ibid.*, p.1636.

thought, "law...does some amazing stuff - and, what's more, does it *all by itself*".[67]

Alternatively, we have 'rule of law thought', including theories such as that of Dworkin, which represents law as a craft, and holds that law works fairly well: "illegitimacy, indeterminacy, or incoherence are largely illusory".[68] This type of thought always views law from the internal, committed, normative perspective identified with that of the judge. "The space of the external perspective serves as a rhetorical dumping ground for misguided, irrelevant, and threatening lines of inquiry about the rule of law".[69] It is the rule of law vision which has "systematically and unconsciously assumed the perspective of a normative and epistemically competent agent and, in turn, reduced the agent to a certain idealized image of the appellate judge",[70] without any consideration of the question: "How is the legal subject rendered epistemically and normatively competent in the first place?"[71]

The third type of thought Schlag considers is critical legal thought, which, he argues, reverses rule of law thought: it liberates the subject but constrains the legal object.[72] The result of this type of thought is that the subject is constructed and channelled as a choosing being, which is oppressive and absurd.

> "Much of its absurdity can be seen in the normative visions that routinely issue from the legal academy urging us to adopt this utopian program or that one - as if somehow our choices (I like decentralized socialism, you like conservative pastoral politics, she likes liberal cultural pluralism) had any

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[67] *Ibid.*, p.1646.

[68] *Ibid.*, p.1663.

[69] *Ibid.*, p.1668. On the internal-external distinction as Schlag understands it, see also his "Normativity and the Politics of Form", pp.916-26.

[70] Schlag, "The Problem of the Subject", p.1667.

[71] *Ibid.*, p.1673.

[72] *Ibid.*, pp.1697-8.

direct, self-identical effect on the construction of our social and political scene...To tell people that they are already empowered to make political value choices is, in effect, to bolster the dominant culture's representation that we are free-choosing beings and to strengthen the forces that lead to our own, repeated, compelled affirmation of (meaningless) choices".[73]

For Schlag the mistake at work here is "the presupposition that arguing about political values is somehow synonymous with engaging in politics".

The myth at the core of the authority of governance therefore may not only be the veil between the community and the violence of the constitution of the community but also a construction of those who set out to justify that constitution. Schlag argues that in the United States of America the practice of the justification of the state is "shaped by, and organized around, the aspirations and problems of a popular constitutional mythology".[74] This mythology is based upon a narrative which revolves around certain key 'ontological identities': 'the Constitution', 'the Founding', 'the People' and 'the Consent of the People'. This narrative "ostensibly establishes the authority of the Constitution, justifies that authority through reason, and achieves both tasks in such a way as to demonstrate the consent of the governed to constitutional rule".[75] The drive is "to persuade the consumers of the liberal myth that, informed by *reason, they freely choose an authoritative*, constitutional liberal state".[76]

Liberalism, says Schlag, refurbishes the popular mythology in order to make the myth seem intellectually more convincing. Thus we find 'Constitution' replaced by 'paramount norm', a norm which is preferably "abstract, capacious and even mystical", such as Dworkin's paramount norm of integrity - that of making the

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[73] *Ibid.*, pp.1700-1.

[74] Schlag, "The Empty Circles of Liberal Justification", p.3.

[75] *Ibid.*, p.3.

[76] *Ibid.*, p.9.

law the best it can be.[77] The practice of liberal justification also attempts to rework the subject who consents to the paramount norm, using "moral flattery, the promise of communal belonging, the incentive of self-interest, and a certain amount of rhetorical bullying"[78] to prompt identification with the 'mythic subject' - 'We the People' (Ackerman), or 'Persons in the Original Position' (Rawls), or 'Hercules' (Dworkin).[79] All four identities of the constitutional narrative are refashioned in a way which reconciles authority, reason and freedom.

The 'empty circle of justification' is the circle into which the consumer must be persuaded to enter:

> "The circle of justification must be constructed so that the circular motion operates smoothly - so that the mythic subject does indeed consent to the paramount norm, so that the paramount norm becomes authoritative in a founding moment, so that the political and legal entailments of that paramount norm sustain the mythic subject".[80]

How is this consent elicited from the consumer? Schlag argues that "it is through the medium of emotion - through fear, shame, seduction, and romance - that the consumer of liberal justification is induced to enter the circle of justification".[81]

Let us move back to Europe for a moment and consider Schlag's arguments in relation to the European Union. It is striking how the popular constitutional mythology identified by Schlag in America has begun to be mirrored in a pale way here in Europe. There is the process of 'constitutionalisation'; there is the

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[77] *Ibid.*, p.12.

[78] *Ibid.*, p.14.

[79] *Ibid.*, p.13.

[80] *Ibid.*, pp.23-4.

[81] *Ibid.*, p.25.

introduction of citizenship; there is the symbolism of subsidiarity. However, whereas in the States the popular mythology is well-established, in the Union the weakness of its public face is eclipsed by the strength of the circles of justification that are gathering force. Castiglione suggests, following Ackerman, that a 'constitutional moment' is needed to legitimate the European polity;[82] Weale proposes a constitutional convention.[83] Weiler flatters and seduces us into agreeing with his supranational model: "the Community ideal of Supranationalism is evocative of, and resonates with, Enlightenment ideas...[It] is heir to Enlightenment liberalism".[84] He uses the spectre of fascism to frighten us into turning away from the 'unity' model[85] and romances us with the "bold challenge" of new visions of the future of Europe.[86]

Europe clearly demonstrates the 'rhetoric of the circle', which is not just one circle of justification, but circle upon circle:

> "What is promised is an examination of the gap between the ideal and the reality. What is delivered is an examination of the gap between a higher order ideal (liberal justification) and a lower order ideal (popular liberal mythology)".[87]

Myth becomes meta-myth and vice-versa: justifications of the Union through, for example, conceptions of a 'civic demos' or models of the economic constitution vie with each other to be adopted at the lower order level. What is offered as a justification of 'reality' is then adopted as 'reality'; "while claiming

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[82] Castiglione, "Contracts and Constitutions".

[83] Weale, "Democratic Legitimacy and the Constitution of Europe".

[84] Weiler, "Europe After Maastricht - Supranationalism, Nationalism and the State", p.326.

[85] *Ibid.*, pp.328-9.

[86] *Ibid.*, pp.329-330.

[87] Schlag, "The Empty Circles of Liberal Justification", p.33.

to be argument - a progression of reasoning - [liberal justification] is instead a circular activity".[88]

There are two ways of reacting to this conclusion. For Schlag the modernist belief that legitimate authority and the exercise of power can be distinguished is false. For Weber too, argues Lukes, despite Weber's talk of the 'voluntary' acceptance of maxims, the prevailing principles of legitimation (especially democratic ones) are no more than myths injected into the masses by elites.[89]

Yet Schlag himself offers a different view:

> "The social existence of a shared legal and political world is, in part, a creation of myth. To put it perhaps too strongly: If we are going to have a legal and political world at all - liberal or not - it will be, at least in part, a construction of myth. In a sense, then, it would be bizarre, even perverse, to begrudge a legal and political system simply for its use of myth".[90]

To the extent that law and politics are socially constructed, therefore, myth is "an extremely effective vehicle for the creation and sedimentation" of particular beliefs and practices.[91]

The construction of a myth of European legitimacy is perhaps a necessary step in the exercise of co-operation that the Member States have embarked upon. However, Schlag's objections that the three common types of normative legal thought result in process of 'politics of form'[92] - the system whereby subjects are shaped by a mode of thought and then unconsciously replicate it - are harder to deal with. Schlag argues that the problem for all normative thought, which

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[88] *Ibid.*, p.39.

[89] Lukes, "Perspectives on Authority", p.207.

[90] Schlag, "The Empty Circles of Liberal Justification", p.19.

[91] *Ibid.*

[92] Schlag, "The Problem of the Subject", p.1742.

would included normative justifications of authority, is the implausibility of the premise that sovereign individual subjects are controlling the levers of social machinery.

> "[N]ormative work...falsely represents
>
> > instrumentalist strategies as within the control of individual subjects
> > the unfolding of bureaucratic logic as the choices of individuals
> > the discursive mechanisms of coercion as normative dialogue".[93]

The result of this normative work is that "[r]ather than contributing to our understanding or to the realization of the good or the right, all this normative argument simply perpetuates a false aesthetic of social life".[94]

The key to an answer is to be found in this last sentence: the understanding or the realization of the good or the right. The problems with normative thought identified by Schlag are either inadequate attention given to the subject or an exaggeration of the power of the individual subject to choose. As Ward says, "complacency and sycophancy are the two greatest dangers in today's Europe, not scepticism or critique".[95] I would argue that by filling the subject, not emptying it, we can think most fruitfully about the legitimacy of the European Union. This means firstly to have faith:

> "any 'legal vision of the new Europe' has to be recognised as resting upon an act of faith, and not merely reason - faith that despite epistemological difficulties, understanding is possible (if accompanied by a realisation of its own limitations), faith that the European legal venture is worthwhile";[96]

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[93] *Ibid.*, p.1739 (visual presentation Schlag's own).

[94] *Ibid.*, p.1740.

[95] Ward, *The Margins of European Law*, p.ix.

[96] Jackson, "'Legal Visions of the New Europe': *Ius Gentium, Ius Commune*, European Law", p.34.

and to have ideals:

> "[the type of ideals which the E.C. encapsulated] require a community for their practice, in fact they are constitutive of a Community – they create the community on whose existence they depend".[97]

In Chapter Four I cited writers who criticise Dworkin's theory as being impossibly romantic and idealised. I will now turn that impossible idealism on the European Union.

I will take two particular aspects of Dworkin's work: his theory of principled community and his theory of participation. What I wish to do is avoid the approach noted at the beginning of the chapter, which is to propose models (such as Weiler, Haltern and Mayer's consociational model, or Joerges' economic constitution) which might fit the Union. Instead I will try to break down the possible justifications for the authority of the Union into smaller parts. Essentially, our Western notions of democracy are based upon a particular concept of the form a state should take, and the way in which its citizens should be able to participate within it. Dworkin considers exactly these two issues: in what form do we want our political community to be fashioned, and how and to what extent to we wish to be involved in the exercise of authority which is needed to act as a group?

The kernel of legitimacy is this: for each person, the exercise of authority upon him will be justified if the group adheres to values with which he largely agrees, and if the group allows him to affect and be involved in the exercise of that authority. The next two sections consider these elements under the headings of 'community' and 'participation'.

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[97] Weiler, *The Constitution of Europe – Do the New Clothes have an Emperor?*, p.255.

6.4 Community

As I noted above, it has been argued that the EU's authority is justified by its protection of human rights and its commitment to equal treatment, and that legitimacy comes through adherence to substantive political principles and particular forms of government such as constitutional democracy. Although writers such as Ladeur doubt the possibility of a political constitution in Europe based on shared values on the ground that it is 'somewhat vague' ("a mere desire to avoid the distressing side-effects of nationalism furnishes no clear values upon which an alternative and functioning institutional and decisional system might be based"),[98] others call for a 'principled moral basis' for the community based upon understanding, acknowledgment and accommodation of difference, and upon the fundamental concepts of equality and freedom.[99]

An good example of an argument which focuses upon the nature of the form of association of the EU is Weiler's identification of a recent movement toward a model of European integration which emulates the self-legitimising presentation of the nation state. Weiler identifies two competing visions of European integration. One, the 'unity' vision, sees as its aspiration a statal Europe: it wishes to "redraw the actual political boundaries of the polity within the existing nation-state conceptual framework".[100] The second, the 'supranational' vision, is "the notion of community rather than unity". It seeks to "redefine the very notion of boundaries of the State, between the Nation and State, and within the nation itself".[101] It is the second vision that has historically held sway, and which Weiler prefers, but post-Maastricht it is the first that has come into

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[98] Ladeur, "Towards a Legal Theory of Supranationality - The Viability of the Network Concept", p.37.

[99] Ward, "In Search of a European Identity", pp.322-323.

[100] Weiler, "Europe after Maastricht - Supranationalism, Nationalism and the State", p.324. Weiler also construes these two competing visions in "After Maastricht: Community Legitimacy in Post-1992 Europe", pp.35-41.

[101] *Ibid.*

ascendancy. "In its rhetoric Maastricht appropriates the deepest symbols of statehood: European citizenship, defense, foreign policy - the rhetoric of a superstate...[T]hey undermine the ethics of supranationalism".[102]

In Chapter Four I argued that Dworkin's theory of law as integrity does not fit the political practices of the European Union or Community. The interpretation of Community law as committed to integrity failed the initial test of fit, which, on Dworkin's terms, precludes any consideration of the second test, that of justification. However, Dworkin's arguments in support of the justification limb of the test of integrity are based upon a detailed analysis of the nature of a legitimate community which, uncoupled from the related claims about integrity in law, offers a stepping-stone for this chapter's objective to bring a new perspective to this type of legitimation of authority. The concept of principled community that he develops is an *ideal* model; the value we can ascribe to it is its utility as an aid in reflecting what type of community we may wish our own community to develop into.

Dworkin builds up his argument through a discussion of the nature of associative obligations and of the community within which such obligations may arise. His premise is that political obligation is a form of associative obligation, which, if certain conditions are fulfilled, can take on the close 'fraternal' form. If these conditions are fulfilled in a political community it becomes a particular model of community, 'true associative community', or 'principled community', which is the only type of community which has legitimate authority.

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[102] Weiler, "Europe after Maastricht - Supranationalism, Nationalism and the State", p.327.

6.4.1 Associative obligations and the conditions of principled community

In order for a political community to be legitimate, "its constitutional structure and practices [must be] such that its citizens have a general obligation to obey political decisions that purport to impose duties on them".[103] What exactly must those "constitutional structure and practices" be like, therefore, in order to give rise to this "general obligation" of its citizens? Various answers can be given to this question, and Dworkin touches on several - the idea of a social contract, for example, and the argument from fair play.[104] Yet none of these, in Dworkin's view, seem to give any positive reason why a member of a political community should accept its rules as binding upon her. Instead, he looks to communities in which people do, in their everyday lives, feel some kind of obligation: communities such as families, friends, and neighbours. These obligations arise not because we, as individuals, explicitly choose or consent to join the group, but simply because as a matter of practice we are members. For example, obligations of friendship are not obligations that we have *assumed*: on the contrary, "it is a history of events and acts that *attract* obligations, and we are rarely even aware that we are entering upon any special status as the story unfolds".[105]

Of course, these associative obligations do depend on the actions of the other members of the group, and there is an element of choice in the extent of the obligations. They depend, for example, on reciprocity: my special responsibilities toward a brother or neighbour are sensitive to the degree to which the brother or neighbour accepts special responsibilities toward me. However, Dworkin warns that reciprocity does not mean "each doing for the other what the latter thinks friendship concretely requires". If it were so,

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[103] LE, p.191.

[104] Dworkin discusses these alternatives in LE, pp.190-195.

friendship would become "more a matter of people checking in advance to see whether their conceptions [of friendship] matched well enough to allow them to be friends".[106] Reciprocity must be more abstract, in the sense that we must be ready to allow our own conception of friendship to be vulnerable to the wider interpretive test of the group as a whole.

The associative obligations of an individual thus depend on the nature of the group. A group may be a 'bare' community if it meets the "genetic or geographical or other historical conditions identified by social practice",[107] but further conditions must be met for it to give rise to associative - fraternal - obligations between its members. Those conditions relate to the members' attitudes about the responsibilities they owe one another, and Dworkin identifies four of them:

> Firstly, they must regard the group's obligations as *special*, holding distinctly within the group, rather than as general duties its members owe equally to persons outside it. Second, they must accept that these responsibilities are *personal*: that they run directly from each member to each other member, not just to the group as a whole in some collective sense. [...] Third, members must see these responsibilities as flowing from a more general responsibility each has of *concern* for the well-being of others in the group... [...] Fourth, members must suppose that the group's practices show not only concern but an *equal* concern for all members".[108]

If these particular conditions are met, the bare community is also a 'true' community, in which people have corresponding obligations, whether or not they want them, although of course the conditions will not be fulfilled unless

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[105] LE, p.197.

[106] LE, p.198.

[107] LE, p.201.

[108] LE, pp.199-200.

"most members recognize and honor these obligations".[109] However, it is important to note that a true community must be first a bare community: "I would not become a citizen of Fiji if people there decided for some reason to treat me as one of them".[110]

Notwithstanding the importance of the concept of a 'bare community' in Dworkin's argument, he devotes not more than a few lines to it, writing that "we have no difficulty finding in political practice the conditions of bare community".[111] Unfortunately, this is not so in the case of the Union. One of the most trenchant critiques of authority in the EU is to be found in the debate over 'demos', which shows that the fulfilment of the conditions of bare community within the Union is not clear cut.

The 'no-demos' thesis might be crudely characterised as the theory that direct democracy can only exist within a community that has a certain level of cohesiveness and certain criteria of what it is to belong to that community; demos is said to be absent at the European level. The thesis found expression in the German Federal Constitutional Court's decision in the *Brunner* case,[112] and this aspect of the judgment is analysed in particular detail by Weiler, who offers a 'composite version' of the no-demos thesis, "culled from the decision of the Court itself". According to this version, the 'subjective manifestations' of the demos "are to be found in a sense of social cohesion, shared destiny and collective self-identity which, in turn, result in (and deserve) loyalty".[113] They are a result of the following 'objective elements': common language, common history, common cultural habits and sensibilities and, to some extent, common

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[109] LE, p.201.

[110] LE, p.202.

[111] LE, p.207.

[112] BVerfGE 89, 155; English translation [1994] 1 CMLR 57.

[113] Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", p.225.

ethnic origin and common religion.[114] The Court argues that as a matter of empirical observation, based upon these 'organic cultural-national criteria', there is no European demos. The implications of this, notes Weiler, are that "absent a demos, there cannot, by definition, be a democracy or democratisation at the European level".[115] The no-demos thesis has an "implicit and traditional solution: Cooperation through international treaties...covering well-circumscribed subjects".[116]

The no-demos thesis is harshly criticised by Weiler. He summarises his critique as follows:

> "My challenge...is *not* to the ethno-cultural, homogeneous concept of *Volk* as such. It is, instead, to the view which insists that the *only* way to think of a demos, bestowing legitimate rule-making and democratic authority on a polity, is in these *Volk*ish terms. I also challenge the concomitant notion that the *only* way to think of a polity, enjoying legitimate rule-making and democratic authority, is in statal terms. Finally, I challenge the implicit view in the decision that the only way to imagine the Union is in some statal form...Noteworthy is not only the 'enslavement' to the notion of State, but also...the inability to contemplate an entity with a simultaneous multiple identity".[117]

Weiler's proposal is a demos understood in "non-organic civic terms, a coming together on the basis not of shared ethnos and/or organic culture, but a coming together on the basis of shared values, a shared understanding of rights and

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[114] *Ibid.*, pp.225-6.

[115] *Ibid.*, p.230.

[116] *Ibid.*, p.231.

[117] *Ibid.*, p.238 (emphasis in original).

societal duties and shared rational intellectual culture which transcend organic-national differences".[118]

I have quoted extensively from Weiler here because his challenges mirror the exhortation I drew from Balkin's critique of legal understanding in Chapter Four: to shift the focus of study from the properties an object (the European Community legal system; the Union polity) is thought to have to the nature of the subject who apprehends it. Balkin's elaboration of his 'critical perspective' gave us three elements: understanding is a purposive activity of subjects, not the apprehension of existing properties of the object; understanding is shaped by the subject's values, beliefs, knowledge and commitments; and the act of understanding an object will influence the subject. Clearly, the third element has assumed particular importance in the case of understanding the Union, which demands a freedom of thought to match its sui generis nature. As Philip Schmitter has suggested, our familiarity with the model of the nation state has affected us to the extent that it actually limits our capacity to envisage political entities which do not match our experience: "It seems self-evident to us that this particular form of organising political life will continue to dominate all others...enjoy a unique source of legitimacy and furnish most people with a distinctive identity".[119]

The German court's understanding of demos is linked to its state-bound assumption that loyalty must be exclusive: that, as Weiler, puts it, an entity cannot have a 'simultaneous multiple identity'. This view is pithily put by Mestmäcker: "there are limitations to the democratic legitimacy of European law as long as we are Europeans who simultaneously owe and accept obedience to the authorities of our home country".[120] Mestmäcker, however, is not correct. In Chapter Three I attempted to show how it is perfectly possible for

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[118] *Ibid.*, p.243.

[119] Schmitter, "Representation and the Future Euro-polity", p.381.

[120] Mestmäcker, "On the Legitimacy of European Law", p.629.

there to exist multiple demoi and allegiances so long as one system does not exercise its authority in such a way as to force a conflict of norms which presents its subjects with an unavoidable choice between competing systems. There may exist limitations on the effectiveness of European or national law which will arise in the case of a collision of authority, but the normative justification of European law is unaffected by the need for dual loyalty.

It is also crucial to recognise the purposive element of understanding at work in any approach to the EU: as Weiler comments, the German court, notwithstanding its doubts, "is forced, for political and other reasons, to accept and 'whitewash' the Community and Union...which suffer from very serious democratic deficiencies".[121] Writers, unlike judges, are less subject to practical considerations such as the wider effect one's decision may have upon the polity itself. Yet commentators participating in the demos debate cannot avoid taking up a particular perspective and a purposive position. The dialectic between the two approaches of rational reconstruction and deconstruction common to the committed, normative point of view is, as the next paragraphs show, clear.

On the one hand, writers such as Weiler and MacCormick defend a constructive model of European demos based on a civic conception of community membership. Civic nationalism, according to MacCormick, identifies the nation in terms of its members' shared allegiance to certain civic institutions, understood in broad terms.[122] On the other hand, writers such as Grimm, while agreeing that collective identity may be rooted in bases other than ethnic, argue that the creation of a civic demos in the Union is not possible. Grimm claims this to be so given the lack of a common language

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[121] Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", p.222.

[122] MacCormick, "Liberalism, Nationalism and the Post-sovereign State", p.150.

through which to establish the Europe-wide 'communication media' that is a pre-condition such a conception of community.[123]

The ball comes back into the reconstructive camp once more with Habermas' comment on Grimm: "[g]iven the political will, there is no *a priori* reason why [Europe] cannot subsequently create the politically necessary communicative context as soon as it is constitutionally *prepared* to do so".[124] Gerstenberg is on the same side: "what is required for democracy to be possible in multicultural societies is the weak constraint that citizens who know that they disagree on moral, religious, and political issues, nevertheless share a commitment to the idea of conducting political argument on common ground".[125] Yet the deconstructive team weigh in once more: Habermas is said to "[overestimate] the problem of generating collective bonds".[126] "Legally and politically, nothing at all speaks...in favour of the assumption that a constitution can be founded on the mere 'political will' to communicate. The state cannot be reduced to a mere set of discursive processes".[127]

The movement to and fro between these two approaches shows that we have reached the point where claims about the properties of the European polity are not sufficient: the question becomes, more pertinently, what sort of demos do we wish to build. The debate over bare community mirrors, as I hope shall become clear, the question of legitimacy. The committed, normative perspective will, necessarily, be engaged in circles of justification that will oscillate between the reconstructive and deconstructive. Both the categories of arguments based on community and participation, like the debate on bare

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[123] See Grimm, "Does Europe Need a Constitution?", pp.292-297.

[124] Habermas, "Remarks on Dieter Grimm's 'Does Europe Need a Constitution?'", p.307.

[125] Gerstenberg, "Law's Polyarchy: A Comment on Cohen and Sabel", p.350.

[126] Ladeur, "Towards a Legal Theory of Supranationality - The Viability of the Network Concept", p.37.

[127] *Ibid.*, p.39.

community summarised above, stem from this perspective. Similarly, arguments based on myth and on task can be found in relation to the demos question. The no-demos argument skates over the element of coercion and the exercise of pure will and power in the creation of 'homogenous' communities. "Any view which is nostalgic about the shelter of the nation state should remember Ernest Renan's insight that it is the loss of memory or even deliberate historical error that creates a nation: the loss of memory about past atrocities and violence toward minorities or underprivileged social groups".[128]

While the dialectic between the 'demos' and 'no demos' camps would, for those such as Pierre Schlag who take up the critical perspective, be condemned as sterile - an 'empty circle of liberal justification'[129] - the view that a collective identity could be formed through the construction of a myth of community does not negate the value of the perspective of the ideal observer. As we saw, Schlag argues that the practice of liberal justification of the American state is shaped by and organised around the "aspirations and problems of a popular constitutional mythology",[130] and concludes that the practice of liberal justification cheats the members of a community into believing that they freely choose an authoritative, constitutional liberal state.[131] Following Schlag's arguments, we are flattered, cajoled and bullied into accepting the myth of an authority which legitimately exercises power over us. Yet as the demos/no-demos debate shows, we are capable of considering the form of communal life that best furthers the common good, whether it be based on 'organic cultural-

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128 Gerstenberg, "Law's Polyarchy: A Comment on Cohen and Sabel", p.349, citing Ernest Renan, *Qu'est-ce qu'une nation?*, (1882) (Presses Pocket 1992) at p.41: "L'oubli, et je dirai même l'erreur historique, sont un facteur essentiel de la création d'une nation, et c'est ainsi que le progrès des études historiques est souvent pour la nation un danger. L'investigation historique, en effet, remet en lumière les fait de violence qui se sont passés à l'origine de toutes les formation politiques, même de celles dont les conséquances ont été les plus bienfaisantes. L'unité se fait toujours brutalement...".

129 Schlag, "The Empty Circles of Liberal Justification".

130 *Ibid.*, p.3.

131 *Ibid.*, p.9.

national criteria' or civic nationalism. We should similarly be capable of using our best endeavours to create and further that form of communal life. Therefore, let us move on from the question of demos and bare community, and reflect further on the way in which governance within a community may have legitimate authority.

6.4.2 Political obligations: three models of community

Dworkin presents three general models of political association,[132] each of which describes the attitude the members of the community model would self-consciously take toward each other. These models are: (i) 'de facto' community; (ii) 'rulebook' community; and (iii) principled community. The first model supposes that members of a political community "treat their association as only a de facto accident of history and geography", and see no further distinction between their community and others. The second model supposes that the community members accept and obey rules that they have negotiated. However, they have no sense that the rules emerge from some common commitment; on the contrary, they take them merely to represent a compromise between antagonistic interests and opinions. It is on this question that the second model differs from the third; in a community of principle people accept that they are governed not just by rules but also by principles, common principles that express the commitment of the community to a particular scheme of justice, fairness and due process.

Of all three models, only the third, according to Dworkin, satisfies the four conditions of true associative community. The de facto model violates even the first condition of 'specialness' and adds nothing to the circumstances that define even a bare political community. The second, rulebook, model is initially more promising, as the members do manifest some level of special and personal concern toward each other - concern that the protection and obligation that the

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[132] See LE, pp.208-215.

rules create will be borne and enjoyed by all. However, this level cannot fulfil the level required by the third condition, as the concern it displays "is too shallow...to count as genuine concern at all".[133] We thus come to the third model which, "at least as well as any model could in a morally pluralistic society",[134] fulfils all four conditions. It "makes the responsibilities of citizenship special", it "makes those responsibilities fully personal", "the concern it expresses is not shallow", and "it...assumes...that each [person] must be treated with equal concern".[135] A community of principle is therefore a true associative community and can "therefore claim moral legitimacy - that its collective decisions are matters of obligation and not bare power - in the name of fraternity".[136]

Dworkin's hypothesis that political obligation, including an obligation to obey the law, is a form of associative, or fraternal, obligation, seems difficult to reconcile with our experience of large and impersonal political societies. However, Dworkin points out that a prima facie case is made for his account of obligation in that our ordinary political attitudes seem to satisfy his first condition:

> "We suppose that we have special interests in and obligations toward other members of our own nation. Americans address their political appeals, their demands, visions, and ideals, in the first instance to other Americans; Britons to other Britons; and so forth. We treat community as prior to justice and fairness in the sense that questions of justice and fairness are regarded as

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[133] LE, p.212.

[134] LE, p.213.

[135] LE, p.213.

[136] LE, p.214.

questions of what would be fair or just within a particular political group.".[137]

Dworkin is correct that this prima facie case is made out in relation to our state political communities, but as the discussion of the demos debate above highlights this is not clear at the European level. However, as I explained earlier, I do not wish to consider Dworkin's claims that only in a 'principled' community is integrity accepted in relation to the Community or Union. Dworkin himself notes that these models are ideal: "we cannot suppose that most people in our own political societies self-consciously accept the attitudes of any of them". Instead, Dworkin "constructed them so that we could decide which attitudes we should try to interpret our political practices to express".[138]

The rulebook and principled models correspond in many ways to the intergovernmental and supranational models of the EU discussed earlier. As we saw, the intergovernmental conception emphasises the power of the Member States in dictating the decision-making of the Community and Union. As Weiler writes, "[t]he political scientists of the realist school never tire telling us that the evolution of European integration was driven by national self-interest and cold calculations of cost and benefit to its participating Member States".[139]

This image of the political practices of the EC resonates with Dworkin's descriptions of the rulebook community: for example, he says that each person in a rulebook community "can use the standing political machinery to advance his own interests or ideals".[140] The difference between a rulebook and a principled community is brought most sharply into relief by their respective members' attitudes toward the community's law: the members of a rulebook

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[137] LE, p.208.

[138] LE, p.214.

[139] Weiler, "Does Europe Need a Constitution? Demos, Telos and the German Maastricht Decision", p.319.

[140] LE, p.212.

community "have no sense that the rules were negotiated out of a common commitment to underlying principles that are themselves a source of further obligation; on the contrary, they take these rules to represent a compromise between antagonistic interests or points of view".[141]

The Council of Ministers is the main Community and Union 'legislator', and its political practices would seem to match far more closely the rulebook model than the principled. Mancini graphically describes the Council as resembling "an intergovernmental round table often characterised by all the warmth of a love match in a snake-pit. In other words, its members regularly speak, and no doubt think, in terms of negotiating with their partners much as they would do in any other international context".[142] Similarly, Weiler comments that the Member States have often acted as if the Community (let alone the Union) were an instrument for the furtherance of their national policies, not an independent political and legal system.[143] It seems that the members of the European Union should identify far more with the idea that they are governed by "rules hammered out in political compromise"[144] rather than by common principles.

On the other hand, the 'supranationalist' elements in the Union reflect the picture of principled community that Dworkin draws. Supranationalism emphasises the existence of independent policy-making structures and the idea of the EU as an independent order.[145] This vision of the EU relies on the Community as created by the so-called "constitutionalisation" of the Community order. This is, famously, the process through which the

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[141] LE, p.210.

[142] G. Federico Mancini, "The Making of a Constitution for Europe", p.598.

[143] "[B]y virtue of the near total control of the Member States over the Community process, the Community appeared more as an instrument in the hands of the governments rather than as an usurping power" - Weiler, "The Transformation of Europe", p.2449.

[144] LE, p.211.

[145] See, generally, Weiler, "The Community System: The Dual Character of Supranationalism", p.267.

Community is said to have mutated from a community of relationships between States essentially governed by international law (merely a "compact among States")[146] to a community founded on the rule of law and with a "basic constitutional charter, the Treaty".[147] Weiler charts the metamorphosis of the Community by dividing the constitutionalisation period into three. He shows how the Court of Justice, during the first, 'foundational period' (the 1960's and 70's) established the four doctrines of direct effect, supremacy, implied powers and human rights protection which have rendered the relationship between the Member States and the Community "indistinguishable from analogous legal relationships in constitutional federal states".[148]

A community of principle is committed to a scheme of principle which informs and restricts its political decision-making. This commitment is also found within the European Union. The Union's scheme of principle is founded on the principle of the rule of law, but includes such principles as democratic representation, respect for national identity, the protection of fundamental rights, and judicial protection.[149] New principles have also been added to this scheme: the Maastricht Treaty introduced the principle of subsidiarity, which informs and restricts the legislative powers of the Union according to the principle that action will be taken only "if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States".[150]

Similarly the Member States and the "peoples of Europe" share long-term aims and goals within the common project of "an ever closer union". The preambles

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[146] Koen Lenaerts, "Some Thoughts About the Interaction Between Judges and Politicians in the European Community", p.1.

[147] *Parti écologiste 'Les Verts' v European Parliament*, Case 294/83, [1986] ECR 1339, at p.1365.

[148] Weiler, "The Transformation of Europe", p.2413.

[149] These principles are to be found in the Declaration on European Identity adopted by the Member States in 1973 (EC Bull. 1973-12, 130). See further Carlo Curti Gialdino, "Some Reflections on the *Acquis Communautaire*", pp.1112-1114.

[150] Article 5 of the EC Treaty.

of the TEU and EC Treaty set out this common project: to promote economic and social progress and a high level of employment; to constantly improve living and working conditions; and by thus pooling their resources to "preserve and strengthen peace and liberty". Weiler describes how, at least at its foundation, the "very idea of the Community" was associated with "three principal ideals", peace, prosperity and supranationalism,[151] which formed the basis of a new, principled model of co-operation within Europe.

The process of constitutionalisation has breathed life into the scheme of principle and the common project to which the Union was committed, on paper at least, right from the start. It has removed the trappings of international political practice, such as the notion of exclusive state responsibility and its associated principles of reciprocity and countermeasures, from the political sphere of the Community and Union.[152] It has supplied the basis for the supranational vision of the Union as an autonomous and, in some respects, quasi-federal international order. However, it remains the case that the political practices of the Union can still be described as a "two-level game" in which the decision-making even within the Community, let alone the Union, is reduced to inter-state bargaining of the form "national preference formation > interstate negotiation > outcome".[153] How, then, can it be argued that the European Union fits anything but the rulebook model of community, "which takes politics...to be a kind of game"?[154]

The recent growth of differentiation in the Union, with its inroads into the Community, has shaken the supports of a principled construction of the EU. In Philippart and Edwards' opinion, the closer co-operation procedure in Article

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151 Weiler, "Europe after Maastricht - Supranationalism, Nationalism and the State", p.320.

152 *Ibid.*, p.2422.

153 Moravcsik, "Preferences and Power in the European Community: A Liberal Intergovernmentalist Approach", pp.482 and 517.

154 LE, p.213.

11(2) of the EC Treaty is "a major blow to the Community-method by the clear primacy given to national interests over the 'European interest'".[155] However, the cornerstones of principled community still remain. The members of the Union share a common project, common goals and a common scheme of principle. This commitment demands sacrifice, which the Member States have made and will continue to do so in the future.[156]

Most of all, however, it is the strength of the protection of the principle of equality, or as Dworkin calls it, equal concern, in the Union which assumes a community of principle. Equality is enshrined in the prohibition of discrimination on the ground of nationality in the EC Treaty,[157] but is also to be found in other provisions of the Treaties[158] and has also been developed as a general principle of Community law by the European Court of Justice.[159] The commitment to equality within the Community runs deep: as Joseph Weiler says, the concept of the single market itself is a "highly politicized choice" which is "premised on the assumption of formal equality of individuals".[160] Yet it must be allowed that its politics can oscillate between a "theater of moral argument and commitment based in the responsibilities of community"[161] and a

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155 Philippart and Edwards, "The Provisions on Closer Co-operation in the Treaty of Amsterdam: the Politics of Flexibility in the European Union", p.97.

156 As Weiler puts it, the "Member States thus face not only the constitutional normativity of measures adopted often wholly or partially against their will, but also the operation of this normativity in a vast area of public policy" ("The Transformation of Europe", p.2463).

157 Article 12.

158 For example, Article 141 (equal pay for men and women for equal work) and Article 34(2) (prevention of discrimination between producers and consumers within the Community).

159 See, for example, *Firma Albert Ruckdeschel & Co* v *Hauptzollamt Hamburg-St Annen*, Case 117/76, [1977] ECR 1753, where the Court established that "similar situations shall not be treated differently unless differentiation is objectively justified" (p.1769).

160 Weiler, "The Transformation of Europe", p.2477.

161 Dworkin, "Foundations of Liberal Equality", p.38.

"market for discovering passive revealed preferences",[162] where the parties aim to secure every possible advantage at the others' expense.

Dworkin argues that we should interpret our politics as constituting a principled community if we value the particular consequences that such an interpretation would bring. Those consequences may be practical, moral, and expressive. One practical consequence is the effect on the legitimacy of the community: political obligation is no longer a matter of obeying the discrete political decisions of the community one by one, but instead "fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme".[163] However, in a polity such as a rulebook political community, where rules are hammered out in political compromise, we would not wish the consequences of an interpretation which claimed it to be a community of principle: rules are the product of a bargaining process in which each side has tried to compromise as little as possible, and it would be unfair to claim that the final agreement contained anything not explicitly agreed. It is possible to point to several viewpoints which seem to take up the view that the European Community should be interpreted to be a rulebook community. Hartley, for example, is horrified at the thought that the Court of Justice should interpret Community law "contrary to the natural meaning of the words used"[164] - exactly the understanding of judicial responsibility corresponding to a rulebook conception of the European Community.[165]

It is however time to underline a theoretical distinction that has force within the Community context: the justified use of coercive power is one thing, and

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[162] *Ibid.*

[163] LE, p.190.

[164] Hartley, "The European Court, Judicial Objectivity and the Constitution of the European Union", p.95.

[165] Of course, the implications of which model we prefer to interpret the Community as expressing go beyond the immediate question of legitimacy. If the rulebook model is

authority is another. Raz gives an example: "I do not exercise authority over people afflicted with contagious diseases if I knock them out and lock them up to protect the public, even though I am, in the assumed circumstances, justified in doing so".[166] All political authorities do use coercion, but all legal authorities do much more - they claim to impose duties and confer rights. Whatever the method of decision-making, as soon as a legal right or duty is created the question of legitimacy takes on a greater urgency, since this creation of a legal norm brings with it a particular relationship of responsibility toward those members of the community subject to it. This is because in most democracies there exists a concern that individuals are treated justly and fairly.

Where the *Union* is concerned, the rulebook model is fine in so far as those rules 'hammered out in political compromise' have effects only upon those that thrashed them out. This is not the case within the *Community*, and has not been since the introduction of the doctrines of direct effect and supremacy by the Court of Justice. It is at this point that the separation between the first pillar and the Union becomes clear. Article 34 of the TEU expressly states that decisions made under the Union umbrella but outside the first pillar shall *not* entail direct effect.

Weiler shows how the doctrine of direct effect, introduced in the celebrated *Van Gend en Loos*[167] case and one of the foundations of the process of constitutionalisation, has actually exacerbated the problem of legitimacy within the Union.[168] In *Van Gend* the Court found that:

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adopted by a community's judges, this will manifest itself in the way those judges decide cases.

166 Raz, "Authority and Justification", p.116.

167 *Van Gend en Loos* v *Nederlandse administratie*, Case 26/62 [1963] ECR 1.

168 See Weiler, "European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order".

> "Independently of the legislation of Member States, Community law...not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage".

As Weiler says, this phrase sharpens the issue, for here are "obligations imposed on individuals *independently of the legislation of Member States*".[169] But why should individuals treat the decisions of the Community which impose duties upon them as authoritative? How can the Community claim to have legitimacy to make these decisions?

As we saw above, members of a community have a duty to obey the community's rules if the community has certain characteristics that give rise to these obligations among its members. Who are the members of the European Community? The Court of Justice in *Van Gend* replies:

> "[the] Community constitutes a new legal order...the subjects of which comprise not only Member States but also their nationals".

Thus the 'subjects' of the EC are not only states, but also individuals. The doctrine of direct effect therefore seems to be given authority on the ground that individuals are elevated to the status of full subjects alongside Member States.[170] Yet this is "highly problematic", in Weiler's words. Individuals became subjects, or members, of the Community, only as a consequence of the direct effect of the obligations which were imposed upon them. "[T]o the extent that the High Contracting Parties retained the prerogatives to make the obligations bestowing rights on individuals...[*Van Gend*] *accentuated* the problem of legitimacy".[171]

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169 *Ibid.*, p.109 (emphasis in the original).

170 *Ibid.*

171 *Ibid.*, p.110.

The Community would have had a good claim to legitimacy as a rulebook community if the obligations it created had effect only upon the Member States that negotiated them. However, as soon as individuals became subject to those duties that claim lost its force. Given the impact of the exercise of Community authority upon Union subjects, which is comparable to that of a state, the justification of that authority must also be comparable to that of a state. This does *not* mean that the constitutional structure of the Union or even the particular values it adheres to must necessarily be comparable to that of a state. The ideal of principled community can only be applicable to the Union in part - in relation to the Community, where governance is comparable with governance in those political societies.

On this analysis, the crux of the question of legitimacy within the European Union is whether a particular norm or body of norms has direct effects upon individual citizens. The difficulty this creates is that we are accustomed to authorities which have either power to affect individuals (e.g. state bodies) or power to affect states (e.g. international organisations), not both. It leads to the conclusion that to ask whether 'the Union' or 'the Community' or 'the Commission' is legitimate is to ask the wrong question. Instead, we must ask whether the particular authority which an institution is exercising is legitimate. The Dworkinan test of 'scheme of principle' can only apply to areas of competence.

Therefore, according to Dworkin's ideals, and so long as only authority exercised through the first pillar has direct effect, we should view the Community as a community of principle, and the rest of the Union as a rule-book community. This distinction also holds for the nature of citizens' participation in authority, which I will consider next. However, before moving on a few words on the 'ideal' of a community of principle are necessary. As we saw in Chapter Four it is arguable that Dworkin's theory is too highly rationalised: "it attempts to do away with the inconsistencies that inevitably inhere in the particularization of right and to principle in any social order. The

result is a very strained coherence, which...carries within it the danger of perpetuating pretense in the name of rational order".[172] Cornell argues that whereas, for Dworkin, "[to] speak in different voices would be to undermine the personification of the community, as it would also supposedly defeat the community's claim to authority as a community of principle",[173] in reality "a complex community can never speak in a single voice".[174]

In Chapter Four I argued that the expansion of the concept of flexibility into the Community shows that although the integrity and coherence of the Community is viewed as an ideal to be upheld, we do not give it the overriding weight that Dworkin suggests is necessary. As Raz says, the reality of politics leaves the law untidy[175] – and we may wish, especially within the Union, to leave it that way.

6.5 Participation

By 'participation' I mean the arguments that commonly fall within the so-called 'democratic deficit' debate. Such arguments are based upon the theory that authority is justified if it is democratic - 'democratic' generally being understood to mean that citizens in some way give their consent to the laws which affect them. Thus we find claims that the Union's legitimacy will be improved if the European Parliament is strengthened,[176] or if there is efficient exercise of collective decision-making,[177] or if there is greater transparency in order to give citizens better information in their participation in decision-making.[178] There

[172] Cornell, "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation", p.1176.

[173] *Ibid.*, p.1158.

[174] *Ibid.*, p.1177.

[175] Raz, *Ethics in the Public Domain*, p.314.

[176] Hrbek, "Federal Balance and the Problem of Democratic Legitimacy in the EU", p.63.

[177] Eleftheriadis, "Aspects of European Constitutionalism", p.41.

[178] Petersmann, "Constitutionalism, Constitutional Law and European Integration", p.261.

are also more sophisticated examples: Gerstenberg, for one, suggests that Cohen and Sabel's idea of 'directly-deliberative polyarchy' offers a unique way to consider the possibility of widespread participation in a large scale political system such as the EU, the achievement of equal treatment for citizens and the fulfilment of normative preconditions for democracy.[179] Joerges agrees that new forms of democratic governance, including direct democratic governance, should be extended to transnational arenas.[180] Gerstenberg writes: "by creating and fostering those communicative environments which are required by radical democracy in the form of directly-deliberative polyarchy, European supranational law could gradually bootstrap itself to legitimacy".[181]

Dworkin's theory of community is closely aligned to his theory of what it is to be a member of a community. It is clear that in discussing a legitimate political community Dworkin presupposes that that community will have citizens: "A state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them".[182] To interpret a community as a principled political community makes, therefore, the "responsibilities of *citizenship* special: each citizen respects the principles of fairness and justice instinct in the standing political arrangements of his particular community".[183] Dworkin argues that we should therefore interpret our politics as accepting integrity because integrity thus promotes the ideal that citizens are the 'authors' of political decisions that impose obligations upon them.

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[179] See Gerstenberg, "Law's Polyarchy: A Comment on Cohen and Sabel", pp.350-355; see also Cohen and Sabel, "Directly-Deliberative Polyarchy".

[180] Joerges, "The Impact of European Integration on Private Law: Reductionist Perceptions, True Conflicts and a New Constitutional Perspective", p.379.

[181] Gerstenberg, "Law's Polyarchy: A Comment on Cohen and Sabel", p.355.

[182] LE, p.191.

[183] LE, p.213 (emphasis added).

Although the necessity of a particular kind of membership of a political community is touched upon only obliquely in *Law's Empire*, Dworkin develops the theme in later work, where he argues that "self-government is possible only within a community that meets the conditions of moral membership, because only then are we entitled to refer to government by 'the people'".[184] By 'moral membership' he means "the kind of membership in a political community that *engages* self-government".[185]

Before setting out the conditions of moral membership and asking whether they exist within the Union, I have to take several steps backwards and colour in the context of the concept of moral membership, for it slots into a wider panorama of reflections by Dworkin on the nature of democracy. The flip-side of the coin of membership is the concept of collective action. "Government by the people" means democracy - but there is deep disagreement about what democracy really means. One vision, for example, as we have seen, argues that democracy as rule by the people, or *demos*, demands that there be a common sense of belonging expressed in such things as a common press and media, common political parties, common political debate. On these criteria, the European Union is not a democratic entity. Moral membership fits, therefore, into a wider debate about the nature of democracy and the sort of democracy - if any - we wish to interpret the Union as constituting.

6.5.1 Conceptions of democracy

Dworkin believes that underneath the debate on what government by the people 'really' requires in order to count as democracy there lies a fundamental philosophical dispute about the "fundamental *value* or *point*" of democracy.[186]

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[184] FL, p.24.

[185] FL, p.23.

[186] FL, p.15 (author's emphasis). In this section on moral membership I draw particularly from Dworkin's discussions of democracy, collective action and moral membership as set out in

One account of democracy is based upon what he calls the 'majoritarian premise', which is a thesis about the correct outcomes of a political process. The majoritarian premise insists that political procedures should be designed so that, "at least on important matters, the decision that is reached is the decision that a majority or plurality of citizens favors, or would favor if it had adequate information and enough time for reflection".[187] Dworkin argues however that we should reject the majoritarian conception of democracy. He defends instead an account of democracy that he calls constitutional, and which denies that the defining goal of democracy is to fulfil the will of the majority. On the constitutional conception of democracy, the defining aim of democracy is that "collective decisions be made by political institutions whose structure, composition and practices treat all members of the community, as individuals, with equal concern and respect".[188]

We shall see how integrity as a political principle is rooted in the constitutional conception of democracy. On the very basic definitions given above, though, it is difficult to see why we should reject the majoritarian premise, which seems to reflect so closely our political institutions and procedures. Dworkin's argument steps sideways, however, away from discussions of constitutions and decision-making, and toward the question of what people actually do when they 'practise' democracy. He begins with a "benign but important observation: that democracy, like almost any other form of government, involves collective action".[189] In considering what collective action is like, we can decide which kind of collective action we take democratic government to require.

FL and the two articles "Liberal Community" and "Equality, Democracy, and Constitution".

[187] FL, pp.15-16.

[188] FL, p.17.

[189] Dworkin, "Equality, Democracy, and Constitution", p.329.

6.5.2 The nature of collective action

Dworkin distinguishes two kinds of collective action - 'statistical' and 'communal'. Here is the definition of statistical collective action:

> "Collective action is statistical when what the group does is only a matter of some function, rough or specific, of what the individual members of the group do on their own, that is, with no sense of doing something *as* a group".[190]

We might say, then, that yesterday the foreign exchange market drove down the price of the Euro. This is collective action in that only a large group of bankers and dealers can affect a currency in this way, but our reference to the "foreign exchange market" does not point to any actual collective entity. We could just as well make the more overtly statistical observation that yesterday the combined effects of individual currency transactions were responsible for the lower price of the Euro at the latest trade. The statistical reading of collective action, therefore, leads to a particular reading of the idea that democracy is government 'by the people': that "in a democracy political decisions are made in accordance with the votes or wishes of some function - a majority or plurality - of individual citizens".[191]

I would suggest that the 'intergovernmentalist' conception of the European Union discussed earlier lends itself to the statistical view of collective action. The situation is complicated by the fact that government 'by the people' in the EU is not direct - due to the limited powers of the European Parliament - and is translated to a large extent through the medium of the Member States, but it is clear that the intergovernmental view emphasises decision-making as reduced to a function of the individual actors involved, whether Member States or

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[190] Dworkin, FL, p.19, and "Equality, Democracy, and Constitution", p.329.

[191] FL, p.20.

Union institutions. This means, further, that the intergovernmental model embraces a majoritarian conception of democracy, since the majoritarian premise presupposes a statistical appreciation of collective action.

What is the alternative? The second kind of collective action identified by Dworkin is *communal.*

> "Collective action is communal...when it cannot be reduced just to some statistical function of individual action, because it is collective in the deeper sense that does require individuals to assume the existence of the group as a separate entity or phenomenon".[192]

As an example of a paradigmatic form of communal collective action, Dworkin describes an orchestra:

> "An orchestra can play a symphony, though no single musician can, but this is not a case of statistical collective action because it is essential to an orchestral performance not just that a specified function of musicians each plays some appropriate score, but that the musicians play as an orchestra, each intending to make a contribution to the performance of the group, and not just as isolated individual recitations".[193]

Translating this form of action to the political sphere, we can see that democracy, on the communal reading, will mean that political decisions are taken by a distinct entity - the people as such - rather than by any set of individuals one by one.[194]

How can people become a 'distinct entity'? Dworkin himself admits that this idea may seem "at best a matter of Hegelian mystification, and at worst an

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[192] Dworkin, "Equality, Democracy, and Constitution", p.329.

[193] *Ibid.*, and see also FL, p.20.

[194] See Dworkin, "Equality, Democracy, and Constitution", p.330, and FL, p.20.

invitation to totalitarian oppression". It obviously echoes the equally mysterious proposition he makes in *Law's Empire* that a community can be 'personified', and must be so if the argument that a community can accept and commit itself to particular principles - including integrity - is to be sustained.[195] Yet as his example of the orchestra demonstrates, collective action in this communal sense is not so incomprehensible to us. It is by examining the important features of these familiar kinds of communal action that we can understand how a community - and the European Union - might be understood to be an entity beyond the sum of its members.

6.5.3 Communal collective action

As we saw in the example of the orchestra, the musicians' self-conscious intention to play together as a group was essential to the orchestra becoming a 'distinct entity'. This intention, suggests Dworkin, is the key to making sense of communal action: "communal action depends not on the ontological priority of community over individual, but on a certain kind of shared attitudes among individuals".[196] When we act self-consciously, "we implicitly make two assumptions about the *unit* of action in play".[197] First, we assume a particular *unit of responsibility*, by which Dworkin means "the person or group to whose credit or discredit, achievement or failure, the action rebounds".[198] Secondly, we assume a particular *unit of judgment*, by which he means "the person or group

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[195] See, in particular, LE, pp.167-168.

[196] Dworkin, "Equality, Democracy, and Constitution", p.335.

[197] *Ibid.* (emphasis in original).

[198] *Ibid.* In "Liberal Community" Dworkin changes terminology slightly: the "person or group or entity treated as the author of and held responsible for the action", which seems to me to be practically synonymous with the definition in "Equality...", becomes the 'unit of *agency*'. I will treat them as one and the same, retaining the term 'unit of responsibility', as I believe it to be clearer.

whose convictions about what is right or wrong are the appropriate ones for us to use in making that assessment".[199]

Most of the time we assume ourselves, acting as individuals, to be the unit of responsibility. The statistical conception of collective action does not change this: the individual remains responsible. However, let us look again at the musicians in the orchestra. They do not view themselves responsible individually for the success or failure of the orchestra: the 'orchestra' itself becomes the new unit of responsibility. As Dworkin puts it, "[i]t is the orchestra that succeeds or fails, and the success or failure of that community is the success or failure of each of its members".[200] In this case "the attitudes of individuals create and presuppose a new unit of responsibility: the group".[201]

So the change in the unit of responsibility is the criterion distinguishing statistical from communal collective action. A change in the second unit, however, the unit of *judgment*, further distinguishes two forms of communal collective action: 'monolithic' and 'integrated'.

> "In the case of integrated collective action, while the shared attitudes of participants create a collective unit of responsibility, they do not create a collective unit of judgment: the unit of judgment remains thoroughly individual. In the case of monolithic action, on the contrary, both the unit of responsibility and the unit of judgment become collective. Once again, this is a matter of shared attitudes".[202]

To continue our example, it would be as if the orchestra's conductor tried to dictate what standards of taste and virtuosity his violinists should cultivate.[203]

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[199] Dworkin, "Equality, Democracy, and Constitution", p.335.

[200] *Ibid.*, p.493.

[201] *Ibid.*, p.335-336.

[202] *Ibid.*, p.336.

[203] See FL, p.25-6.

The effect of the collectivisation of the unit of judgment in the case of monolithic action is, of course, to deny the importance of the individual within a community, and Dworkin defends *integrated* communal collective action against it.

And so at last we can return to the argument from moral membership, for moral membership and communal collective action in its integrated form come hand-in-hand. Unfortunately, however, the connection between the 'entity' created by the shared attitudes of the members of the community, and the conditions of membership of that community, is not clear. Does moral membership constitute the integrated community, or does the integrated community constitute its membership? Jo Shaw suggests that community and citizenship are part of a virtuous circle of reciprocal reinforcement:[204] I shall adopt that position here in relation to Dworkin's theory, and consider both moral membership and integrated community together.

6.5.4 Moral membership and integrated political community

We have suddenly jumped from discussing action to discussing community, and political community at that, but the connection is simple. We began with two concepts of democracy. In a constitutional democracy, the form that Dworkin favours, and which accepts integrity, the people govern communally. They treat their community as a collective unit of responsibility, which means that they, as moral members, share the responsibility for whatever their government does. But while in this communal democracy the people may form a distinct unit of responsibility, they do not form a collective unit of judgment. Each member insists that "his political convictions are in every important sense his business",[205] in that he is free to judge on his own terms the success and failure

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[204] Jo Shaw, "Interpreting European Union Citizenship: A Contribution to European Identity?", p.24.

[205] Dworkin, "Equality, Democracy, and Constitution", p.337.

of his community. The constitutional community is a political form of integrated communal action.

The idea of integration is ambivalent in Dworkin's work. Integration seems to refer to two aspects of communal collective action, linked by the idea inherent in the 'personification' of community that "the lives of individual people and that of their community are integrated".[206] Firstly, he discusses integration from the point of view of an individual who 'integrates' with a community, by which he seems to mean that the individual recognises that as a member of the community his concern for his own well-being must extend to a concern for the life of the community as a whole.[207] Secondly, 'integration' is approached from the angle of the community: an integrated community is integrated because of the practices and attitudes of its members: social practice must have created an integrated, or "composite", unit of responsibility.[208]

It would be nonsense for someone to claim to be a 'integrated' member of an 'integrated' community "by personal fiat", which is to say, "simply by declaring and believing that he is part of it". Dworkin comments that he cannot just "declare himself integrated with the Berlin Symphony Orchestra and thereafter share in that institution's triumphs and occasional lapses". Of course, this is also true from the other side: the Berlin Symphony Orchestra cannot just declare me to be a member of the orchestra and blame me - or praise me - for lapses and triumphs. "There must already be a common unit of agency,[209] to which I am already attached, for it to be appropriate for me to regard myself as...integrated

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[206] Dworkin, "Liberal Community", p.491.

[207] *Ibid.*, p.492.

[208] See *ibid.*, p.494.

[209] Or "unit of responsibility". See the discussion of terminology above.

with its actions".[210] Equally, there must be integrated members, to be able to regard them as members of that particular community.

Let us just recap the initial 'argument from moral membership' that is being considered here. Dworkin argues that we should interpret our politics as accepting integrity because integrity thus promotes the ideal that citizens are the 'authors' of political decisions that impose obligations upon them. We have followed the steps in Dworkin's argument, from the idea of "government by the people" to the requirements of a particular type of membership of a political community (moral membership) and a political society which is a particular type of community (integrated community). We can now return to the European Union. Are the "peoples of Europe" moral members of the European Union? And is the Union itself an integrated community?

6.5.5 The members of the European Union - 'moral members'?

What are the conditions of moral membership, and does the European Union fulfil them? There are two kinds of conditions.[211] The first set is *structural*, and describes the conditions that the community as a whole must meet if it is to count as a genuinely communal political community. For example, the community must have generally recognised and clearly established territorial boundaries. The second set is *relational*: the conditions "describe how an individual must be treated by a genuine political community in order that he or she be a moral member of that community".[212] A community must give each of its members a *part* in any collective decision, a *stake* in it, and *independence* from it.

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[210] Dworkin, "Liberal Community", pp.494-495.

[211] Dworkin, FL, pp.23-26, and "Equality, Democracy, and Constitution", pp.337-342.

[212] FL, p.24.

6.5.5.1 The structural conditions

The set of structural conditions is not given in detail by Dworkin, and in fact the requirement of stable territorial boundaries is the only condition he establishes as necessary in *Freedom's Law*. However, it seems that these structural conditions are the minimum conditions that determine how and when people share a social practice - here, a common political life. In *Law's Empire* Dworkin explains that in order to share a social practice people must understand the world in sufficiently similar ways that they are able to recognise the sense in each others' claims: they must share "what Wittgenstein called a form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does".[213]

It is not clear whether Dworkin would, under his category of 'structural conditions', include any requirement of shared religion, ethnicity, or culture. He does assume that such consensus requires that the members of the community must speak the same language,[214] but then countries such as Switzerland which do not have one common language would obviously fulfil the structural conditions nevertheless. In discussing the possibility of a European political identity underpinning political community Anthony Smith argues that collective identities are "forged out of shared experiences, memories and myths" and that in the absence of cultural homogeneity within Europe no European identity can exist.[215] This understanding of membership as requiring strong ethnic, linguistic, historical and cultural bonds between people emerges, as discussed earlier, in the debate on demos within the European Union.

As in the question of bare community, Dworkin does not develop any detailed arguments regarding the structural conditions that he believes are necessary for a

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[213] LE, p.63-64.

[214] LE, p.64.

[215] Smith, "National Identity and the Idea of European Unity", p.75.

community to share a common political life. However, he insists that the communal life of a community is restricted only to those acts which, by social practice, are understood to *be* communal. I discuss this idea later but it will be useful to illustrate this idea now with the example Dworkin gives: musicians in an orchestra do not suppose that the orchestra has "headaches, or high blood pressure, or responsibilities of friendship, or crises over whether it should care less about music and take up photography instead".[216] It is perfectly possible then, in turning to a political community, to conceive of membership and community as encompassing purely political bonds, as suggested by MacCormick's concept of a civic demos, that is, "one identified by the relationship of individuals to common institutions of a civic rather than an ethnic or ethnic-cultural kind".[217]

6.5.5.2 The relational conditions

The principle of stake

If a community is to be understood as communal, collective decisions must reflect equal concern for the interests of all its members, which means that "political decisions that affect the distribution of wealth, benefits, and burdens must be consistent with equal concern for all".[218] It is this principle which underlines the requirement of reciprocity within an integrated community: a person is not a member unless he is treated as a member by others, and treating him as a member means "accepting that the impact of collective action on his

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216 Dworkin, "Liberal Community", pp.495-496.

217 MacCormick, "Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'", p.341. See also Weiler, "European Neo-constitutionalism: In Search of Foundations for the European Constitutional Order", pp.113-116, where he discusses a European demos understood "in non-organic terms, a coming together on the basis...of shared values, a shared understanding of rights and societal duties and a shared rational, intellectual culture" (p.113).

218 FL, p.25.

life and interests is as important to the overall success of the action as the impact on the life and interests of any other member".[219]

The principle of stake - of equal concern as a political ideal - permeates the political life of the European Union and is enshrined in various provisions of the Treaties. Members of the Union are treated equally in the sphere of political representation; discrimination against them on grounds of their nationality or of their sex is prohibited. The members of the Union are treated with equal concern; as we saw earlier, the concept of the single market itself is a "highly politicized choice" which is "premised on the assumption of formal equality of individuals".[220] However, the effect of Union norms upon Union citizens does, again, depend upon the sphere of competence: the level of 'stake' is clearly higher within the Community pillar than the other spheres of the Union.

The principle of independence

It is the principle of independence that distinguishes an integrated community from a monolithic. As we saw earlier, in a monolithic community the 'unit of judgment' is not the individual but the community itself. In an integrated community, however, the members are allowed, even encouraged, to view moral and ethical judgment as their own personal responsibility, not the responsibility of collective unit. The community in this way respects the principle of independence, which "therefore insists that a democratic government must not dictate what its citizens think about matters of political or moral or ethical judgment, but must, on the contrary, provide circumstances that encourage citizens to arrive at beliefs on these matters through their reflective and finally individual conviction".[221]

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[219] Dworkin, "Equality, Democracy, and Constitution", p.339.

[220] Weiler, "The Transformation of Europe", p.2477.

[221] Dworkin, "Equality, Democracy, and Constitution", p.340.

In the European Union the principle of independence may be more familiar in the form of a fundamental right, including freedom of speech, freedom of association, and freedom of religion. All these are included in the European Convention on Human Rights and Fundamental Freedoms, to which all the Member States are parties. The Community, however, is not; but the Court of Justice has drawn on the Convention on various occasions in giving effect to the rule that Community law includes fundamental rights, including freedom of religion and expression.[222] The Union is also bound to respect fundamental rights as guaranteed by the Convention by virtue of Article 6 of the TEU,[223] which reads:

> "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States".

It is clear, then, that the Union fulfils the condition of independence.

The principle of participation

A community must give a moral member a part in any collective decision. Firstly, each person must have a role which allows him or her to make a difference to what the community does. Secondly, that role must be consistent with the assumption that every member of the community is equal, and so cannot be "structurally fixed or limited by assumptions about his worth or talent or ability".[224] The principle of participation is democratic in virtue of its second part. It explains, for example, why an orchestra is not a democracy. The conductor is not normally chosen by the musicians of the orchestra, but

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[222] See respectively Case 130/75, *Prais* v *Council* [1975] ECR 1589, and Case C-260/89, *Elliniki Radiofonia Tileorassi Anonimi Etairia* v *Cimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR 2925.

[223] O'Leary, *The Evolving Concept of Community Citizenship*, p.292.

[224] Dworkin, "Equality, Democracy, and Constitution", p.338.

imposed upon them, and his power to define and dictate the orchestra's performance is given to him on the grounds that he has special talents ordinary members do not.[225] Democracy cannot be like that.

It is the principle of participation that insists on universal suffrage, and structures of representation that make political offices open in principle to everyone. It demands, in effect, effective representation for all on the basis of equality.[226] The principle insists, moreover, on the genuine freedom for each member of the community to make his voice heard: "he must be allowed voice as well as vote".[227] Thus the participation principle includes political liberties, such as freedom of speech and protest, within the idea of democracy.

In the European Union, the principle of participation is probably the weakest of all the conditions of moral membership. The lack of transparency in the decision-making procedures of the Union and the lack of control over the un-elected institutions are said to give rise to a "democratic deficit".[228] For example, there is a lack of parliamentary accountability, a lack of electoral power (for example to replace those who govern), compromised national judicial control, an overall lack of transparency, and a preponderance of bureaucratic structures and technocratic language.[229] As Joerges says, "the triangle of administrative discretion, judicial control and political accountability which characterizes fully-fledged legal systems is still in its infancy at the Community level".[230]

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225 *Ibid.*

226 *Ibid.* (and see also FL, pp.24-25).

227 *Ibid.*

228 Weiler sums up the 'democracy deficit' argument in "The Transformation of Europe", pp.2466-2474.

229 See, for example, Weiler, Haltern and Mayer, "European Democracy and its Critique", pp.6-9; Hauser and Müller, "Legitimacy: The Missing Link for Explaining EU-Institution Building", p.27.

230 Joerges, "European Economic Law, the Nation-State and the Maastricht Treaty", p.61.

However, the principle of participation in the Union context must take account of the fact that the members of the Union are not simply individuals, but also the Member States. On Dworkin's arguments, the Member States are not merely the sum of their nationals, but must be viewed as separate 'units of responsibility'.[231] There are thus various layers of participation in the Union's political life, which should include both the involvement of the Member States in the Union but also the *direct* involvement of individuals in, firstly, the life of the Member States, to the extent and in those spheres that the Member State is their means of making a difference to what the Union does, and, secondly, the Union itself.

How can I, then, as a member of the European Union, make a difference to what the Union does? First of all, I can take part in the elections choosing members of the European Parliament,[232] both as a voter and as a candidate for election. I can do so even if I am resident in another Member State, and on the same conditions as the nationals of my Member State of residence.[233] Second, in participating in the national elections of the State of which I am a citizen, I can indirectly participate in my State's involvement within the Union, and particularly in the Council of Ministers.

However, that participation in my Member State's activities at the Union level is so limited as to negate any role that allows me to make a difference to what the Union does. The introduction of majority voting in the Council[234] has meant that decisions may no longer be the fruit of the collective will of all the Member States, thus minimising further the role - already limited - of an

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[231] I am assuming here that the nature of the Member States is such that their nationals are 'moral members' and they themselves are 'integrated communities'.

[232] Council Decision 76/787, OJ 1976 L278/1, with the annexed Act on Direct Elections.

[233] Article 19(2) of the EC Treaty.

[234] Articles 122 and 205 of the EC Treaty.

individual citizen.[235] Further, the Council meets in private, and no records are published of the proceedings, which means that the position taken by a particular minister may not even be revealed, unless that minister does so himself. Dehousse argues that the Council "escapes all censure",[236] and clearly the secrecy of its proceedings offers little chance for public debate or accountability.

This lack of transparency is also keenly felt in regard to the intergovernmental conferences amending and creating Union treaties: Curtin, commenting on the secrecy in which the negotiations for the TEU were conducted, argues that "[s]ome of the basic requirements of a democracy, namely transparency, information and public discussion were ignored".[237] The national parliaments of the Member States were eventually "presented with a *fait accompli* and could only say yes or no to the final overall 'package'".[238] This, clearly, is not an adequate opportunity to 'make a difference' to the political life of the Union.

Similarly, while it is true that a citizen of the Union can stand and vote in the elections of the European Parliament, the Parliament is the most feeble of the political institutions of the Union.[239] It has, first of all, no independent legislative powers.[240] As La Torre points out, since its competences are so weak, "a right to participate in its decisions is not at all equivalent to the right to take part in the formation of the collective will of the Union".[241] This judgment remains valid for the Community, although slowly the Parliament's

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235 See generally, Dehousse, "Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?".

236 *Ibid.*, p.122.

237 Curtin, "The Constitutional Structure of the Union: A Europe of Bits and Pieces", p.18.

238 *Ibid.*, p.19.

239 See Dehousse, "Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?", p.123.

240 See, generally, Weatherill, *Law and Integration in the European Union*, pp.71-78.

241 La Torre, "Citizenship: A European Wager", p.121.

competences have been extended, and continue to be extended. Dehousse, for example, argues that the influence of the Parliament, which now has true joint decision-making power (with the Council) in some areas, and power to approve or reject the membership of the Commission, could transform the balance of power within the Community.[242]

Suggestions regarding the means through which to improve the quality of members' participation in the Union vary greatly. Joerges, for example, notes that one should not be exclusively preoccupied with the role of the European Parliament, and gives a package of ideas which range from the horizontal interaction between national agencies to the 'juridification' of regulatory activity.[243] Much more can be said about the political participation of the members of the Union in the Union's life, but there is no room here.[244] The question that faces us is whether the capacity given to the members of the Union to make a difference to what the Union does fulfils the criteria of participation that moral membership demands.

I would suggest, first of all, that the principle of participation has to be read as participation up to the limits of the 'life' of a community. On one view of integration, a community may be understood as a 'super-person', its collective life embodying the features and dimensions of a human life.[245] But Dworkin insists that a community's life should be defined more narrowly, including "only the acts treated as collective by the practices and attitudes that create the community as a collective agent".[246] Thus the communal life of an orchestra is limited to producing music - it is only a *musical* life. This view will affect the

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[242] Dehousse, "Constitutional Reform in the European Community: Are there Alternatives to the Majoritarian Avenue?", pp.126-130.

[243] Joerges, "European Economic Law, the Nation-State and the Maastricht Treaty", pp.50 and 61.

[244] See, in general, O'Leary, *The Evolving Concept of Community Citizenship*, chs. 6 and 7.

[245] Dworkin, "Liberal Community", p.495.

[246] *Ibid.*

members of the community's understanding of the level of their participation in the communal life.

The level of participation required to justify the exercise of an authority in the European Union will therefore depend whether that practice is treated as collective. These practices (the limits of the communal life of the Union) have, of course, continually grown and evolved during the existence of the Community and Union. Milward has proposed the thesis that the Member States have never seriously contemplated a genuine European constitution: the sole purpose of the Community and Union has been to buttress the Member States.[247] According to this thesis, Union democracy was the clearest threat to the hegemony of the nation states, and was therefore marginalised. European collective life has been and will be left consciously ill-defined, because it is in the interest of the Member States that it should be so.[248] So let us consider further the question of the identification of collective acts within the European Union.

6.5.6 The European Union: integrated community?

Is the Union an integrated community? Has social practice created an integrated, or 'composite', unit of responsibility? Dworkin offers three features that provide a common unit of responsibility, or agency, in paradigmatic cases such as a flourishing orchestra.[249] First, "collective agency presupposes acts socially denominated as collective, that is, acts identified and individuated as those of a community as a whole rather than of members of the community as individuals". Second, "the individual acts that constitute collective acts are concerted. They are performed self-consciously, as contributing to the collective act". The orchestra performs a particular concerto only when the musicians play

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[247] Milward, *The European Rescue of the Nation State*, pp.2-3.

[248] See Ward, *The Margins of European Law*, ch.3, for a discussion of Milward's thesis.

[249] See Dworkin, "Liberal Community", pp.494-496.

with a co-operative intention. Third, "the composition of the community - who is treated as a member of it - is tailored to its collective acts, so that a community's collective acts explain its composition, and vice versa".

All these three features are to be found within the Union, although there is tension as to their boundaries. Our social practices in general identify the formal political acts of the Union as acts of a distinct legal person rather than of some collection of individual citizens or Member States - although there is contention over the extent to which that is so, and, officially, only the Community has legal personality.[250] The political acts 'internal' to the European Community, by which I mean the acts, including law-making acts, of the Commission, European Parliament and Council, constitute a collective unit. However, the acts of the Member States resulting from intergovernmental co-operation under the umbrella of the Union are not viewed as collective.

This fraying of the edges is reflected in the second feature, since it is precisely the mixed intentions of the Union actors which confuses the collective nature of the Union's acts, even within the Community pillar. Again, the paradigm case is to be found: the Commission, Parliament and even Council, or specific members of the Council, do act self-consciously within a constitutional structure that transforms their individual behaviour into Community decisions.[251] But it is obvious that this is not always true - as we saw earlier, the members of the Council often act self-consciously as representatives of their *national* community, not the Community.

The third feature takes us back to moral membership, and also to Dworkin's argument that the life of a community extends only so far as the particular spheres that are viewed as communal. The third feature of an integrated

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250 See the discussion in Von Bogdandy, "The Legal Case for Unity: the European Union as a Single Organization with a Single Legal System".

251 *Ibid.*, p.496.

community is that its membership reflects its collective acts. The citizens of a political community, then, are those who are particularly affected by its formal political acts and *who play some role in them*.[252] In the European Union, the exponential rate of change in the acts which are *collective* at the European level has not been matched by a comparative change in membership - understood as those who are affected by and who participate in those collective acts. In the first years of the Union, when it existed solely as the Community, its membership was comprised above all by the Member States, and its communal life was centred upon economic acts which affected the Member States as (internally) collective markets. The debate over the democratic deficit in the Union has arisen exactly because the level to which individual members of the Union, as opposed to Member States, are affected by acts of the Union has risen greatly over the years, while individuals' opportunity to participate in those acts has not matched it.

6.6 Conclusion

To sum up, we have seen that there are various suggestions regarding the basis for the legitimacy of the authority exercised within the Union; the Union's role as effective market-maker, its commitment to the protection of human rights, and its provision for democratic decision-making were some of those mentioned. I have tried to make clear that the ways in which authority is exercised should not be confused with the ways in which that exercise may be justified. I also emphasised that the Member States are not inherently legitimate, and nor do the type of tightly knit community and direct participation commonly found in the political life of states automatically justify their authority.

Dworkin's principled community and moral membership may be ideas but not ideals for the European Union. However, I hope to have drawn out at least two

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252 *Ibid.*

things in my discussion of community and participation, First, legitimacy comes down to the form of the community which a group of people have built and the participation of those people within it. A group can choose to come together as a community for particular purposes but this does not mean that those individuals need necessarily remain as a community for other purposes. The key is identify the areas in which authority will be accepted in order to act as an integrated group, and to match the level of participation accordingly in order that the subordination of individual desires necessary to achieve the required consensus to *be* a community does not become intolerable.

This means that within the Union legitimacy must turn on the nature of the authority exercised. Authority which, when exercised, has direct effects upon Union citizens, must reach more stringent criteria of justification than authority which does not. In thinking about legitimacy within the EU we should put aside our familiarity with state structures and focus directly on the exercise of authority. This may mean, however, that a body which exercises authority with both direct and indirect effects should reach a level of participation and commitment to community values which justifies the greater impact of those direct effects.

As a practical suggestion, this conclusion supports the introduction of a model along the lines of Douglas Hurd's, who argues that decision-taking within the EU, possibly for a temporary period (Hurd mentions 20 years), should fall under different defined areas of competence. Hurd sets out three categories of decision-taking, which are: first, those matters which will be decided on a community basis, sometimes on the basis of majority voting; second, those matters on which Member States accept a need to co-operate but where this co-operation should be by agreement between them; and third, those matters "which for the first time would be defined as remaining under national or

regional power".[253] Hurd argues that "if the limits of European power were properly defined...[people] would no longer fear that they were faced with a process leading to the obliteration of their national identity. Hurd warns that "the moment may be arriving when ambiguity hampers rather than helps the processes of Europe".[254]

This picture reflects the concerns highlighted by my application of Dworkin's ideal models of principled and rule-book community: it is not legitimate to apply the same requirements of community and participation to authorities, such as those outside the Community pillar, which have been established not on the basis of a background scheme of principle but through arm's length negotiation. Each justification which may legitimise the exercise of an authority within the Union must match the nature of that authority.

Second, my questions - whether the Union 'is' a principled community, whether citizens of the Union 'are' moral members – are only to be considered with an eye to the sections on myth and task. For as I have discussed earlier, the theories do not necessarily match reality; the theories compete to become reality. Neither should we underestimate the power of our models and theories. MacCormick said that we should ask whether Europe is adequately democratic given the kind of entity we take it to be. But we should be wary: if we take it to be a particular kind of entity, and argue that it should be democratic in a particular way, it might just become that kind of entity, justified in that particular way. The task or the myth is the construction of those who set out to justify the community.

Legitimacy in all its three senses, legal, social and normative, is constituted by a blend of brute force, normative justifications, institutions, symbols and the endless reinterpretation and reconstruction of history. Legitimacy is an emotive

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[253] Hurd, "Endstation Europa", p.15.

[254] Hurd, "Endstation Europa", p.14.

concept, and a complex bundle of choices. However, its trappings should not blind us to the reality that authority can only be justified by its subjects' need of it. Our Member States and the Union are not legitimate as ends in themselves, only insofar as they serve the needs and interests of their citizens in pursuing together a common good.

Conclusion

I began this thesis with Forster, who, in the words of old Mr Emerson, advises us: "Beware muddle". Throughout the thesis I have struggled against muddle, seeking to question and to trace back to its origins every claim that an independent legal system, authority and legitimacy exist in the Union. It is ironic then that I am forced to conclude that while we should still try to *beware* muddle, we may well prefer it to the alternatives that have presented themselves in clearing it away. What do I mean by this muddling statement? I mean that the striking thing about the key chapters on perspectives, system, authority and legitimacy is that they boil down to choices between certainty and uncertainty, and that we may not always prefer uncertainty to certainty.

Perspectives

The quickest way to get into a muddle is to assume that a perspective is whole rather than partial, or to claim too much for one perspective. I argued that Dworkin makes this mistake, failing to see that his judge-centred view may support an excellent theory of legal reasoning but cannot engage with theories of law. Instead, the first step is to identify the point of view from which to

study – for example, the detached normative perspective of the legal scientist, or the committed normative perspective of the judge. This is what I did in Chapter Five with the Herculean judge, arguing that Dworkin's program of adjudication can aid the judge in proceeding through steps of rational and reasonable decision-making, although ultimately the judge must ultimately grasp the nettle and choose.

However, this step is not enough. It is necessary to be aware of further aspects to the particular perspective chosen.. First of all, understanding is a purposive activity: the subject may wish to reconstruct or deconstruct the legal order she studies. Secondly, understanding depends on features of the self: the subject may, when faced with a novel entity such as the European Union, be so conditioned by the constructs of the nation state that she can do no more than attempt to force what she sees into those familiar concepts. Thirdly, understanding has effects on the subject: it may reinforce the subject's existing prejudices, or the subject may too easily accept the way in which the object of study presents itself.

I tried to show how we can use one perspective (the detached normative) to take the lid off sovereignty and expose the political choices that lie at the root of the idea of a legal system, while embracing another (the committed normative) in order to explore the type of community we wish to develop and the ways in which we as citizens should participate within it. Throughout the thesis I have argued that clarity of perspective is desirable: to be certain of our perspective and to be capable of using different perspectives for various ends is a powerful tool.

System

In Chapter Two I applied Kelsen's concept of a norm to the law of the European Union and identified the chain of validity that, for Kelsen, is the essence of a legal system. Those linked norms form a unity if the validity of

each of them can be traced back to the ultimate norm, the Grundnorm. I identified three possible models, according to which Community norms are validated either by international law, or by law of the Member States, or by an independent Community norm. I argued that the strongest case could be put for the hypothesis that the Community had originally been validated by a norm of international law, but that a 'revolution' had taken place and an independent norm is now presupposed in relation to the Community.

Yet Kelsen's theory did not enable me to conclude that this was so; in fact, it did not *allow* me to conclude anything at all. It is not possible, according to Kelsen, to verify the Grundnorm empirically. The Grundnorm is simply presupposed when custom is interpreted objectively as a norm-creating fact. It is therefore possible to act *as if* the Community order were independent while others may act as if it were not. The Grundnorm is a fiction, an aid to thinking. On one hand, it clarifies the choices which are made when one adopts a view as to which model should be 'correct', but on the other hand it allows us to carry on *without* adopting a view; it allows us to maintain uncertainty.

Authority

As such, it also cuts through the doctrine of sovereignty and the conflicting claims as to the source of the authority of the Union. In Chapter Three I argued that whenever we identify a body or rule-maker as sovereign, we are making a silent decision about the hierarchy of the norms which we regard as imposing obligations upon us. As individuals we have, for example, norms of morality, of law, of religion, of the governing body of our football club, which all make claims upon us. Whenever two or more norms require incompatible behaviour from us we must decide which norm takes precedence. The question of sovereignty where we are subject to norms originating from international, Community and Member State law calls, if conflict arises, for this same choice.

This is monism: legal norms are identified in relation to other legal norms, no more, and while labels may be given to bodies of norms which are linked by territory, politics, history, or simple organisation, there can be, ultimately, only one normative order. On this basis I set out nine hypotheses of sovereignty and authority that can be drawn from the connection between international, Community and national norms. By implication, a normative order can only be understood as *normative* from one sole perspective; it is the detached perspective that allows us neutrally to view the nine different choices as to the hierarchy of norms which lie at the roots of the question of sovereignty.

Yet from the detached perspective, each of the nine models is equally correct and justified. As in relation to system, the choice between the different models may only be made on the basis of non-scientific, non-detached, political considerations. The detached normative perspective allows us to view all the possibilities without judging between them, and so long as norms do not come into head-to-head conflict through the different positions in which the Grundnorm is presupposed, different models can happily coexist in the minds of different people.

Legitimacy

The parts of the thesis on legitimacy throw up clarity and indeterminacy in a way which follows on from the question of authority: I rejected the view that any attempt to demonstrate that a polity can be legitimate is no more than a myth, and argued instead that it is more fruitful to take up the practically reasonable perspective described in Chapter One and think about the way in which we would like our communities to be. Yet the almost embarrassing enthusiasm of this second approach does demand an appreciation of the sceptical position of 'myth': the dampening uncertainty of 'myth' can temper the effects of an excess of practically reasonable certainty.

I argued that the legitimacy of the Union depends on identifying the task we wish it to undertake, its nature as a community of people, and the level of appropriate participation. This requires definition of the acts of the Union which are 'collective' (in Dworkin's sense of requiring a 'principled community' to legitimately carry them out), and it is precisely this need for definition which is subject to the oscillation between clarity and indeterminacy. I noted the argument that the Member States have consciously left and will leave European collective life ill-defined, because it is in their interests to do so, and the opposing argument that there comes a time (which time is now) when clarity may be safer than ambiguity, and when the limits of Member State and European power should be properly defined.

Conclusion

My introduction to these conclusions was therefore ingenuous: my argument is not that we may prefer muddle, but that once we have cleared away the muddle and laid our options we may well prefer uncertainty. It is clear that to avoid deciding on the 'real' roots of the authority of the Union may be to avoid futile conflict over insoluble differences. This is not only a negative judgment but a positive: I hope to have made clear that to maintain uncertainty can be a choice to respect difference and not to impose unity.

However, I stand by my argument that while we may make the choice not to choose, it is always best to know what our choices could be. Not to do so is dangerous, and Kelsen, survivor of the holocaust, tells us why:

> "In social and especially in legal science, there is still no influence to counteract the overwhelming interest that those residing in power, as well as

those craving for power, have in a theory pleasing to their wishes, that is, in a political ideology".[1]

Theory is important because what we see is constructed through it; the way we develop reality depends on what we decide reality to be. In the European Union, as in the rest of life, best beware muddle.

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[1] GTLS, *Preface*, p.xvii.

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